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DEPARTMENTAL COÖPERATION IN STATE GOVERNMENT

BY

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A THESIS

PRESENTED TO THE FACULTY OF THE GRADUATE SCHOOL IN
PARTIAL FULFILMENT OF THE REQUIREMENTS FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY

The Collegiate Press

GEORGE BANTA PUBLISHING COMPANY
MENASHA, WISCONSIN

1918

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The Collegiate Press

GEORGE BANTA PUBLISHING COMPANY
MENASHA, WIS.

CONTENTS

	PAGES
INTRODUCTION.....	IX
CHAPTER I. The History of the Advisory Opinion.....	1
In England.....	1
In the United States.....	30
In Canada.....	79
In Other States.....	93
CHAPTER II. The Advisory Opinion in Practice.....	96
The Source of Interrogations.....	96
Nature of Questions.....	99
Form of Replies.....	146
Effect of Replies upon Interrogators.....	153
CHAPTER III. The Interpretation of Advisory Opinion Clauses.....	161
CHAPTER IV. Other Forms of Judicial Influence.....	238
CHAPTER V. The Place of the Advisory Opinion.....	248
APPENDIX I. Text of Advisory Opinion Clauses of State Constitutions.....	258
APPENDIX II. Text of Advisory Opinion Statutes of the Dominion of Canada and the Provinces.....	260
APPENDIX III. Text of Advisory Opinion Provisions in Central and South American States.....	267
APPENDIX IV. Table of Cases.....	269
APPENDIX V. Bibliography.....	295
INDEX.....	297

To
W. A. W.

INTRODUCTION

During the last decade the searchlight of criticism has found a resting place upon the American judiciary with increasing frequency. The censure of our State judicial systems is no longer academic; the thinking citizen body of this democracy has in many ways expressed its conviction that the courts were not giving to the people what the people had a right to expect from them, that the judicial system was inefficient. This generation has witnessed a deplorable shortening of the terms of elected judges, and the introduction into our State constitutions of the dangerous judicial recall and the illogical and indefensible recall of judicial decisions. In some cases these "reforms" have been the result of a commendable fearlessness in the exercise of the so-called judicial veto over unconstitutional legislation. The legislative trickster has had it in his power to shift to judicial shoulders the blame for the failure of legislation demanded by his constituency. More and more have our judges been involved in "politics," at the cost of a decreased efficiency as organs of government. They have become too close to the people in one sense; their vision no longer comprehends all the people, but only a constituency, a social group, or economic class; as Rousseau would say, they express not the General Will, but the will of a temporary association of individuals within the state.

Obviously this calls for correction. In the exuberance of our democracy, we have deluded ourselves into thinking that the rule of the people in a free state means concrete, tangible, personal participation of each individual citizen in the affairs of government. We have lost sight of the fact that directing the complex affairs of a large political society is a task for

experts, that the proper function of the citizens of a free democracy is to choose honest experts to act for them politically, and that in proportion as the inexpert meddle directly in governmental activities, inefficiency will result. In the American system of government, all of this applies especially to the judiciary. It is, then, especially important that we remove our judges as far as possible from factional or sectional politics. They should be the impartial and independent distributors of justice as approximated in the spirit of a given epoch, fearlessly representing the General Will of the democracy from which they derive their authority.

This, it must be admitted, is an ideal, and is subject to two practical qualifications. In the first place, the citizens of our States will not agree to such an exaltation of their judiciary until they can be induced to place in it a larger measure of confidence than they do at present. This calls not only for a revision of judicial procedure (a subject which is beyond the scope of the present discussion) but also for a readjustment of the relations between the three departments of government, so devised as to enable the people to fix the responsibility for a failure to carry out their clear mandates, and thus make it impossible for the executive and legislative departments to saddle the odium of disobedience upon the judicial. Secondly, although the judiciary must not be trammelled by the political entanglements of the other two departments, neither must it be out of touch with them. It is a fundamental of the efficient government of the future, in a representative democracy, that there shall be harmony and cooperation between its component parts. Just as the creative power of the legislature and the administrative resources of the executive should be unreservedly at the command of the courts, if necessary to carry out their proper functions, so, too, the experience and skill of the judiciary should be at the service of the other departments in time of need.

It is believed that the constitutional device which is described in the following pages will go far towards furnishing a solution of this difficult problem. It has been successful

in the mother-state from which we derived the basic elements of our governmental organization, though in recent times it has taken a peculiar form there, scarcely applicable in the United States. It has been developed very successfully in several of our own commonwealths, and has attained a clear-cut definiteness in the Canadian Dominion and Provinces. On its record, as revealed by the present study, it is at least worthy of a very careful consideration, with a view to a more general incorporation into our State constitutional systems.

This device is the so-called advisory opinion. For the sake of the non-professional reader, not conversant with this rather unfamiliar chapter in our constitutional law, a word or two of explanation may not be amiss. It has long been recognized that the Anglo-Saxon judicial system, based on the case-by-case development of precedent, while valuable in many ways, has certain serious defects. This is especially true in the United States where the courts may declare that that which has the form of law is of no effect because its enactment has not been in conformity with the constitution. The very particularism of the case-system may bring about grave inconvenience, if no one cares to bring a "test case" until after many private rights have arisen under the legislation in question. Even though no rights have arisen under a statute, the State has been to the expense of enacting it and securing a subsequent judicial declaration of its unconstitutionality. Again, it is well known that there are many questions of a judicial nature that can be brought before a court in regular proceedings with difficulty, if at all. A "case," in a court of last resort, necessarily involves the adjudication of some private right, the settlement, once and for all, of a private claim. The judgment specifically determines only the particular contention then before the court, though it may, of course, become a binding precedent in later cases of a similar nature. It is binding upon all the parties to the contention who are before the court, and execution will issue to carry it into effect, if necessary. The advisory opinion, on the other hand, is merely the advice of the judges who compose the court of last

resort in a given jurisdiction, rendered at the request of certain executive or legislative organs. The privilege of requiring such advice may be restricted in many ways, for example by limiting it to a particular kind of questions. The purpose of the scheme is to enable the governor or either house of the legislature to ascertain the opinions of the supreme court justices upon questions of a legal nature, before taking action; in other words, to permit them to make the justices their counsellors in difficult matters upon which the latter are peculiarly qualified to give sound advice. It is not an adjudication and binds no one; the interrogator may or may not follow the opinion, as he chooses. In practice, legislative or executive action has usually been in conformity with advice so rendered and the matter has been regarded as settled. However, if an individual is aggrieved by the result, he is free to complain to the courts in regular proceedings and the whole question will be carefully considered *de novo*. From this brief explanation it will appear that we have here a constitutional instrument, the potential benefit of which is not inconsiderable, while, with intelligent use, its potential harm is negligible.

In the following pages, the writer has dealt with the advisory opinion from three standpoints. First of all its historical development in England and the United States has been traced at some length, not merely as a matter of academic interest, but as a necessary preliminary to an adequate understanding of the nature of the institution. This is followed by an exposition of the way the advisory opinion has worked in the United States, and a statement of the more common rules evolved in its practice. Finally, an attempt is made to estimate its value in constitutional systems of the American type.

DEPARTMENTAL COÖPERATION
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CHAPTER I

THE HISTORY OF THE ADVISORY OPINION

A. IN ENGLAND

The giving of extra-judicial opinion by English judges is a practice almost as old as the legal memory defined by statute. Indeed, it is a natural outgrowth of the governmental organization of the twelfth, thirteenth and fourteenth centuries, and both its existence and its nature can be explained and understood only after an examination of the evolution of the English constitution during that period. In the Anglo-Norman system, separation of powers was practically unknown. The same state organ exercised legislative, executive and judicial functions.¹ The king, in whom reposed the sovereignty of the state, was not restricted to unlimited executive activity; he had the right of general legislation as well, with the advice of the *Magnum Concilium*² (a group of ecclesiastics and tenants *in capite* who gathered primarily to pay homage); and through the *curia Regis*, presided over by the chief-justiciar, he dispensed such justice as was vouchsafed his subjects. As organic differentiation developed, vestiges of the privilege of consulta-

¹ Stubbs, C. H., I, p. 366.

² Hallam, Mid. Ages, II, p. 319.

tion and advice enjoyed in the more centralized form not unnaturally clung to the legislative and administrative bodies, now thrown upon their own uninstructed resources. Because of a diversity of practice as well as of historical and juridical considerations, it is advisable to consider separately: (1) The Judges as advisers to the King in his judicial capacity. (2) The Judges as advisers to the King in his executive capacity. (3) The Judges as advisers to the House of Lords in its judicial capacity. (4) The Judges as advisers to the House of Lords in its legislative capacity.

1. *The Judges as Advisers to the King in his Judicial Capacity.* At the beginning of the twelfth century, the important administrative and judicial powers were vested in the king and his *curia*.³ This *curia Regis* was composed of the chief-justiciar,⁴ the chancellor, the steward, the treasurer, the marshal, and other *justitiiarii* appointed by the king. When sitting as a financial body it was known as the exchequer. Within a hundred years a division of labor became necessary and several bodies succeeded to the duties of the old *curia*. There was the Exchequer, with extensive powers of financial administration as well as judicial powers in cases involving the public revenue; there was the royal chancery, a clerical body presided over by the chancellor, the keeper of the great seal; and finally there was a *curia Regis* in a narrower sense—a body of legally trained judges⁵ which had inherited the judicial powers and duties of its ancestral namesake. Of the later sub-division of this court into the King's Bench and Court of Common Pleas, the development of the Court of the Exchequer and the Court of the Chancellor, we are not at present concerned. But still there was a residual judicial power in the hands of the king, "to be exercised by him in the great council of the

³ Maitland, C. H., p. 63. Stubbs, C. H., I, pp. 418 sqq.

⁴ Hallam, Mid. Ages, II, p. 332n.

⁵ Hallam, Mid. Ages, II, pp. 335 and 421-2.

nation, or in some smaller council.”⁶ In theory, of course, even till 1875, the Court of King’s Bench was *coram ipso domino Rege*; but in fact, long after the time of which we are speaking, the king and justices held court together in different parts of the kingdom. Maitland tells us⁷ that “both John and Henry III did justice in person,” and that only in the fourteenth century had it become uncommon for the king to sit in court. Still the separation of the executive and judicial organs had begun⁸ and the judges forthwith endeavored to promote that separation and secure as complete an independence as possible from executive control.

With these facts in mind, it is easy to explain why the king claimed legal advice from his judges, when cases were submitted for his adjudication. Naturally, his *Concilium* expected the same assistance when necessary even in the absence of the king; and the chancellor, when he created a court of his own to deal with cases when the *Concilium* was not sitting, often solicited the help of the king’s judges. In such cases (as matters within their province, though not before them for adjudication) the judges seem to have acquiesced quite willingly in the demands made upon them. It appears that in a *Scire facias* in the Hilary term of 13 Edw. III, the chief justice and two justices of the King’s Bench sat in Chancery to pass on questions of law⁹ and the editor of the Year Book thinks that this was probably a regular proceeding.¹⁰ Indeed, in 1401 the Commons complained that the judges of both the King’s Bench and Common Pleas were giving so much time to Chancery that the administration of the common law was greatly delayed.¹¹

⁶ Maitland, C. H., pp. 69 and 136.

⁷ C. H., p. 134.

⁸ See Maitland, C. H., p. 133, on the abolition of the justiciarship.

⁹ Y. B. 12-13 Edw. III, No. 12.

¹⁰ *Ibid.* Intro. ci-cv.

¹¹ Rot. Parl. 2 Henry IV, No. 95.

Opinions have been given to the king even later than this. In the Earl of Arundel's Case (1449)¹² the Lords had no leisure to examine a case on precedency referred to them by the king, and by their advice the king ordered "that the Juges of the lawe of the lande beyng in the same Parlement, shuld here, see and examyn the seid maters . . . and as they conceyve therinne, they to report to the Kynges Highnesse, and to the Lordes in the same Parlement." After an examination of pleas presented to the king, the judges replied that this was a matter for the king and Parliament to determine, "yet being thereto so commanded, they shewed what they found upon examination, and their opinions thereupon." The king and Lords then decided the case. In the famous Aylesbury Case (also known as Paty's Case),¹³ when the queen was petitioned for a writ of error returnable in Parliament, she referred this first to the attorney-general and solicitor-general and later to all the judges (on Feb. 21, 1704) asking whether she ought to grant the writ of right or of grace. The judges gave the written opinion on February 24, ten of them thinking the writ, if granted, should be of right, two of grace. Because of the disagreement of the Houses of Parliament, the queen finally prorogued them without acting at all.

It remains, in this connection, to advert briefly to the evolution of the Privy Council from the *Concilium Regis*. A permanent royal council, distinct from the *curia*, had become well defined by the beginning of the fourteenth century. Its chief function was to advise the king in all matters referred to it by him. But it also exercised judicial functions,¹⁴ sometimes under statutes of Parliament, more often in spite of the protests of that body. This Council, essentially an administrative organ of the state, in spite of these persisting judicial powers,

¹² Rot. Parl. 27 Henry VI, No. 18. Also 13 Co. Rep. 63.

¹³ 14 East 92 (n). Also reported, *sub nom.* Ashby and White, in 14 Howell's St. Tr. 695-888.

¹⁴ Maitland, C. H., pp. 216 sqq.

is the Privy Council of the time of Edward IV and later. Its composition was quite flexible, varying at the will of the king. In 1404, it contained three bishops, nine peers, and seven commoners. The judges, it seems, did not generally share in its deliberations; Fortescue tells us, however, they could be summoned by the councilors in case they were needed.¹⁵ All matters referred to the Council were dealt with through special commissions appointed to examine the facts and report to the Council. Usually such reports were accepted after the formality of a reading, and the Council rendered judgment upon them. If difficult questions of law arose, the judges were consulted. "Indeed it was repeatedly enjoined by acts of parliament that the lords of the council should in no wise decide legal questions without the aid of the justices. On one such occasion we read of the justices being interrogated individually for their advice. P. P. C. iii, 313."¹⁶ Under Charles II, after the Star Chamber experiment, the judicial powers of the Council were taken from it. In the eighteenth and nineteenth centuries, however, it came to include many judges and ex-judges, whose legal advice would be of great value. So in 1833 Parliament created a Judicial Committee of the Privy Council and provided that "it shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any such other matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid."¹⁷ Here again, then, after nearly two centuries we have another court¹⁸ created out of the Privy

¹⁵ "Also the Juges, the Barones off the exchequier, the clerks off the rolles, and suche lordes as the forsaid counsellours woll desire to be with thaym for materes off gret deficulte, mey be off this counsell when thai be so desyred, and ellis not." Fortescue's *Governance of England*, Chap. XV, p. 148.

¹⁶ Baldwin, *King's Council*, p. 301.

¹⁷ 3-4 Wm. IV c. 41, s. 4.

¹⁸ See (1912) A. C. 571, at 585.

Council, and endowed with very large judicial powers (for it is the highest court of appeal for England's many colonies). At the same time it is the legal adviser of the king on all conceivable matters.¹⁹

Except during the period 1641-1833, a greater or less amount of judicial power has resided in the king or the king in council. In the exercise of that power, he has always had, and still possesses, the privilege of consulting the judges of his courts. The increasing separation of powers from the thirteenth century on has not affected this prerogative, and it does not appear that the judges have ever refused to give such assistance when asked. Whether judges of the King's Bench or other divisions, who are not members of the Privy Council, would feel bound to answer is open to question. In the case already referred to, where the learned Lords of the Judicial Committee acknowledged their obligation to give any opinion requested under Section 4 of the Judicial Committee Act, they called attention to the fact that they are "all Privy Councillors, bound as such to advise the Crown when so required in that capacity."²⁰ The question of the willingness of the other judges to give such opinions will doubtless remain unanswered as long as the Crown can refer to such excellent advisers as the Judicial Committee Act provides.

2. *The Judges as Advisers to the King in his Executive Capacity.* At the close of Edward I's reign, the judicial *curia* and its duties had become quite definite, constitutionally. But the point of importance for us to notice is that some or all of

¹⁹ "Under this clause there is no limit to the extent and variety of matters referable by her Majesty to the Judicial Committee." Macqueen, p. 689n.

"This Committee, exercising most important judicial functions, is undoubtedly liable to be asked questions of any kind by the authority of the Crown, and the procedure is used from time to time, though rarely and with a careful regard to the nature of the reference." (1912) A. C. 571, at 585.

²⁰ (1912) A. C. 571, at 585.

its members are still members of the *Concilium Regis*, the administrative body "to which the king looks for advice and aid in the daily task of government."²¹ The necessity of separate judicial organs has become manifest, but the king is loath to deprive himself of valuable assistance and expert counsel from whatever quarter it may come. In the fifteenth century, though the judges were not in regular attendance upon the *Concilium*, their presence could be requested in case of necessity.²² As long as this state of affairs continued, the king, it seems, commanded the advice of his judges, even in administrative questions. Hallam asserts that the Council appear to have advised the king as to his approval of laws passed by Parliament, regularly during the reigns of Edward I and Edward II.²³ Whether the king, apart from the Council, can consult the judges on administrative matters is not clear. But it is more than reasonable to suppose that he would deem their intermittent membership in the Council and their immediate dependence on him as the fountain of all justice sufficient reasons for claiming their advice, especially in matters of a legal character, and also, to a certain extent, in questions pertaining to his executive rights and duties apart from the enforcement of the laws. Illustrations of inquiries of both kinds are not wanting.

In 1388, Richard II commanded the opinions of the judges on a set of questions concerning certain acts of the last Parliament, and secured from them sealed statements that his ministers could not be impeached without his consent, that

²¹ Maitland, C. H., p. 91. See also Hallam, *Mid. Ages*, III, p. 138.

²² "In the actual records of the privy council it is a constantly recurring regulation that the judges are to be consulted in all matters touching the king's prerogatives or freeholds (P. P. C. iii, 151, 217; iv, 63). Many instances of the presence of the judges are recorded in the Proceedings of the Council." Fortescue, 297. Plummer, the modern editor of Fortescue's *Governance of England*, gives several such instances in the Introduction, pages 46-7.

²³ *Mid. Ages*, III, p. 142.

the impeachment of his favorite, the Earl of Suffolk, could be revoked, that the statute establishing a commission of reform was derogatory to his prerogative and those who passed it guilty of treason, that the king's business took precedence in Parliament, and that he could end the sessions of Parliament at his pleasure.²⁴ These opinions as given were probably extorted by threats,²⁵ but it does not follow that the judges questioned the king's right to consult them, if only he did not dictate their answers.

Macqueen²⁶ cites an interesting case (dated May 9, 1624) where James I refused to give his royal assent to a bill which had passed both Houses until the judges had given him their opinions as to whether it would be retroactive in certain respects or not; he finally assented, relying on their negative answer "as a principal motive."

George I, in 1717, sent a letter by the Lord Chancellor to the judges requesting them to meet and give their opinions as to whether or not the education and care of his Majesty's grandchildren and the Prince of Wales, the ordering of their abode, the approbation of their marriages, etc., belonged of right to his Majesty. The judges apparently did not question their duty to comply, indeed impliedly admitting it in their reply to the request of the Prince of Wales to hear counsel in his behalf, "that in cases wherein our advice is required by His Majesty, we cannot hear counsel without His Majesty's leave."²⁷ After a prolonged consideration of the case they gave their opinions *seriatim*.²⁸

The same monarch, in Sir John Fenwick's Case²⁹ requested the judges and attorney-general "to consider of the King's

²⁴ Hallam, *Mid. Ages*, III, p. 72.

²⁵ See report in Fortescue, p. 392, based on Rushworth, Appendix, p. 261. Also Hallam, *l.c.*

²⁶ House of Lords, p. 54.

²⁷ The king later granted permission for counsel to be heard.

²⁸ Fortescue, p. 401. Also 15 Howell's St. Tr. 1195.

²⁹ Fortescue, p. 385.

pardoning the judgment;" and they all were "of opinion that the King could pardon all or any part of the judgment; and in this case all the judgment in high treason was pardoned, except severing his head from his body, and he was beheaded accordingly."

However, cases of this nature are infrequent. Most of those which have found their way into the reports are, quite naturally, cases of a judicial nature. When the king is especially interested in a prosecution, he may attempt to elicit from the judges in advance of the adjudication in court an opinion as to the state of the existing law or *ex parte* suggestions to the prosecution on questions of procedure or even an actual decision on the merits of the case.³⁰

Thus in Stafford's Case (1485)³¹ where the defendant was taken from a sanctuary under the protection of the Abbot of Abingdon and held for trial in the king's court, the judges were asked to give an opinion at once, before the day set for the hearing. They objected, "How can we debate this matter which will come before us soon? and it is not good order to argue this matter, and give our opinions, before it comes before us judicially. The Attorney-General said, if the King knew that the sanctuary would save him, it should not come before them." But Hussey, C. J., went personally to the king and besought him, "that he would not desire to know their opinions beforehand . . . for they thought it should come before them in the king's bench judicially, and then they would do that which of right they ought; and the king accepted of it."

James I indulged in the most unsparing abuse of the consultative power in cases of a judicial nature in the history of

³⁰ Another common method of interfering with the course of justice is to insist on the postponement of the hearing to a time more convenient for the prosecution, as in the Commendams Case. See Bacon's Works, IV, pp. 631 and 636.

³¹ Fortescue, 389. Coke, Inst. III, pp. 29-30. See also 2 Howell's St. Tr., 879n and Y. B. Pasch. 1 Henry VII, 15. Trin. 1.

the English constitution. He was undoubtedly zealously aided by the ever-active Sir Francis Bacon, who was animated perhaps both by his ambition and his envy of Lord Coke, then chief justice of the King's Bench; for most of the cases are during the period when Bacon was attorney-general and he is most assiduous in pressing them upon the judges. Gross subversion of justice and a serious invasion of the independence of the judiciary were only prevented by the courageous defiance of that sturdy bulwark of the common law, Lord Coke. Two or three cases will illustrate the situation. Best known of all is the case of *Peacham*,³² an enthusiastic clergyman too fond of privately scribbling sermonical tirades against the government never intended to reach the ears of others than himself. His house was searched and several "treasonable" utterances brought to light. The king, apparently, was uncertain whether a prosecution for treason would stand and directed Bacon, with the aid of the solicitor and several sergeants, to sound the judges. The original design was to prevent joint action and one interrogator was assigned to each judge, Bacon braving the chief justice himself. The first encounter was discouraging, for Coke affirmed "that such particular . . . and auricular taking of opinions was not according to the custom of this realm," and doubted whether his brethren would yield.³³ Bacon's collaborators³⁴ were received with more favor; Crook, J., and Houghton, J., were both willing to answer, and Dodderidge, J., declared that "every judge was bound expressly by his oath, to give your Majesty counsel when he was called; and whether he should do it jointly or severally, that rested

³² Bacon's Works, IV, pp. 593-601. 2 Howell's St. Tr. 871.

³³ Bacon's Works, IV, p. 593.

³⁴ They were instructed by Bacon, "that they should not in any case make any doubt to the judges, as if they mistrusted they would not deliver any opinion apart, but speak resolutely to them, and only make their coming to be, to know what time they would appoint to be attended with the papers."

in your Majesty's good pleasure." Bacon later delivered Peacham's papers to Coke, who received them, but with the protest "that judges were not to give opinion by fractions, but entirely according to the vote, whereupon they should settle upon conference: and that this auricular taking of opinions, single and apart, was new and dangerous."³⁵ A letter of February 11, 1614,³⁶ tells us that when Coke heard that the other judges had finally given their opinions, he promised that his would be ready in a short time. Presumably they are the "answers" enclosed in the letter of February 14th.³⁷

It should be noted that the independent Coke rests his objections upon the "particular" taking of opinions, when the judges are consulted one by one and are not permitted to confer. Maitland³⁸ says Coke himself, when solicitor and

³⁵ *L.c.*, p. 596.

³⁶ *L.c.*, p. 601.

³⁷ *L.c.*, p. 601. The comments of Foster on this case are well worth quoting: "And perhaps still less Regard will be paid to it if it be considered that the King, who appeareth to have had the Success of the Prosecution much at Heart, and took a Part in it unbecoming the Majesty of the Crown, condescended to instruct His Attorney-General with regard to the proper Measures to be taken in the Examination of the Defendant. That the Attorney at His Majesty's Command submitted to the Drudgery of sounding the Opinions of the Judges upon the Point of Law, before it was thought advisable to risque it at an open Trial. That the Judges were to be sifted separately and *soon, before they could have an Opportunity of conferring together*. And that for this Purpose four Gentlemen of the Profession in the Service of the Crown were immediately dispatched, one to each of the Judges; Mr. Attorney himself undertaking to Practise upon the Chief Justice, of whom some Doubt was then entertained.

"Is it possible that a Gentleman of *Bacon's* great Talents could submit to a Service so much below his Rank and Character!

"This Method of forestalling the Judgment of a Court in a Case of Blood then depending, at a Time too when the Judges were removable at the Pleasure of the Crown, doth no Honour to the Memory of the Persons concerned in a Transaction so insidious and unconstitutional; and at the same Time greatly weakeneth the Authority of the Judgment." *Crown Law*, pp. 199-200.

³⁸ *C. H.*, p. 270.

attorney-general, had often asked for extra-judicial opinions. Bacon seems to have felt some diffidence about pressing the "particular" feature too far, for on the same day that the judges gave their answers in Peacham's Case, he writes the king of a conference between himself, his legal assistants and all the judges (including Lord Coke), concerning the prosecution for treason of one Owen.³⁹ He adverts to the suggestion of the king that the "taking of opinions apart . . . which was prescribed and used in Peacham's cause" be practiced here, but says they thought it unnecessary "in a case so clear."⁴⁰ The papers were left with the judges and Bacon thinks there will be no doubt of the result. Again in the proceedings against the Earl and Countess of Somerset, the attorney-general several times consulted the judges extra-judicially as to the best course to be followed, always at the king's direction.⁴¹ Other cases might be cited from Bacon's writings and elsewhere, but these serve to indicate the practice of that time.

There seems to have been no question of the obligation of the judges to respond to the king's interrogatories, even though it involved passing upon a case which might come before them judicially in a short time. Dodderidge, J., in the reply quoted above, does not qualify the obligation in any way; and though Coke objected to the "auricular taking of opinions, single and apart," he seems to have given his opinion in every case. True, when he was no longer a judge he protested against the whole custom, and argued well against its desirability,⁴²

³⁹ Bacon's Works, IV, pp. 321 and 600.

⁴⁰ "Yet both my lords of the council, and we amongst ourselves, holding it, in a case so clear, not needful; but rather that it would import a diffidence in us, and deprive us of the means to debate it with the judges (if cause were) more strongly (which is somewhat) we thought best rather to use this form," i.e. a common conference. Bacon's Works, IV, p. 601.

⁴¹ See Letters No. 131 to 138, Bacon's Works, IV, pp. 616-25.

⁴² "The Judges ought not to deliver their opinions beforehand of any criminall case, that may come before them judicially; . . . especially in cases of high nature, and which deserve so fatall and extreme punishment. For

but his practice on the bench was in conformity with the prevailing doctrine that the judges were bound to give the king legal advice whenever he requested it.⁴³

Charles I appears to have been more sparing in exercising his privilege, but extra-judicial opinions were still given. In the case of Stroud, Long, et al.,⁴⁴ the king, before proceeding in the Star Chamber against the members of the House of Commons who had been imprisoned by him, caused the attorney-general to request the opinions of the judges on certain questions as to the privileges of a member of Parliament not to be punished for speeches in the House, as to how long such immunity extended, etc., to all of which the judges gave their replies. But when asked if a member of Parliament could be punished for saying in Parliament that "the Lords of the Council and the Judges had agreed to trample upon the Liberty of the Subject and the Privileges of Parliament," they "desired to be spared to make any answer thereunto, because it concerned themselves in particular." And they replied to another question that as it was a point of law, it "would not be for the honor of the king nor the safety of the subject" to deal with the case in Star Chamber. The king dropped the Star Chamber proceedings, but kept the men in prison, and when *habeas corpus* was sought, he removed them to the Tower and refused to produce them in court. On Michaelmas (1629), he summoned Hyde, C. J., and Whitelocke, J., to Hampton for private advice. During the next term, the court gave its opinion that the men should be released on bail. Other cases of consultation may be inferred from the statement of the son of Whitelocke, J.,⁴⁵ that his father "did often and highly complain against

how can they be indifferent, who have delivered their opinions beforehand without hearing of the party, when a small addition, or subtraction may alter the case." Coke, Inst. III, p. 29.

⁴³ Maitland, C. H., p. 270.

⁴⁴ 3 Howell's St. Tr., 235.

⁴⁵ Memorials, p. 14.

this way of sending to the Judges for their Opinions beforehand." Indeed Fortescue records another case from the time of the Restoration, when "the Judges met to consult concerning the prosecution of the regicides, and the Attorney-General made several queries, not only in framing of the indictments, but in relation to overt acts and evidence, in which all the Judges gave their opinions."⁴⁶

The legal force of judicial responses to the king's questions at this period cannot easily be determined. The king seems to have acted in accord with advice so given in general, as in the Star Chamber case of 1629. But would the judges have felt bound to follow these opinions, if the same case came before them later in court? This is an important point in the light of the present practice in the United States, as will be seen, but it seems impossible to settle it. *Beckman v. Maplesden* (1662)⁴⁷ throws a little light on the question. Bridgman, C. J., tells of a dispute in New Sarum between the mayor and certain vintners regarding the measures used, which was by the Lords of the Council referred for decision to certain judges who passed "resolutions" covering the disputed points. He then continues, "as for the objection made from the resolution of the Judges in 1583, I give these answers to it, that it was an extra-judicial opinion; and though I must give reverence to the opinions of the Judges, yet I make a difference between cases adjudged upon debate and having counsel on both sides, and resolution upon a case reported or referred to them."⁴⁸ But would he extend this principle to carefully weighed opinions solemnly given to the king?

An express reservation on this very point was made in *Whiston's Case* (1711).⁴⁹ There was some doubt as to whether Convocation could take original jurisdiction in a case of heresy,

⁴⁶ Fortescue, 389, on the authority of Keyl. 9, 10.

⁴⁷ Bridg. 60.

⁴⁸ *L.c.* at p. 78.

⁴⁹ *Burnet's Own Times*, p. 867.

and the upper house requested the queen to obtain the opinions of the judges, which she did. Eight judges and the attorney-general and solicitor-general said they had jurisdiction, "but brought no express law or precedent to support their opinion; . . . they were also of opinion, that an appeal lay from the sentence of convocation to the crown; but they reserved to themselves a power to change their minds, in case, upon an argument that might be made for a prohibition, they should see cause for it." Four were *contra*, but the queen said Convocation should proceed, as there was no doubt of the jurisdiction. The same principle was enunciated in the case of Lord George Sackville in 1760.⁵⁰ "But as the matter may several ways be brought, in due course of law, judicially before some of us by any party affected by that method of trial, if he thinks the court has no jurisdiction, or if the court should refuse to proceed in case the party thinks they have jurisdiction; we shall be ready, without difficulty, to change our opinion, if we see cause, upon objections that may be then laid before us, though none have occurred to us at present which we think sufficient." And Mansfield reiterated this proposition in his note to the Lord Keeper enclosing the opinion.⁵¹ The existence of this opinion is of considerable weight in determining the constitutional practice, for it is subscribed to, without protest other than the reservation mentioned, by judges of great authority.⁵²

It will be convenient to stop a moment to summarize the practice at this period, because it was shortly after 1760 that

⁵⁰ 2 Eden, 371.

⁵¹ "The judges . . . are exceedingly thankful to his Majesty for his tenderness in not sending any question to them till the necessity of such reference became manifest and earnest. . . . In general, they are very averse to giving extra-judicial opinions, especially where they affect a particular case; but the circumstances of the trial now depending ease us of difficulties upon this occasion, and we have laid in our claim not to be bound by this answer."

⁵² Mansfield, C. J., Willes, Parker, Denison, Foster, Smythe, Adams, Bathurst, Wilmot, Noel, Lloyd, JJ.

the advisory opinion was introduced into the American judicial system. It was well recognized that the judges were bound to advise the Crown at his request. But the judges were averse to giving such opinions and preferred to do so only when "the necessity of such reference became manifest and earnest."⁵³ (Compare this with the "important question and solemn occasion" clause of the United States practice). Also judicial sentiments severely condemned the giving of opinions in any particular case,⁵⁴ especially in criminal cases. Even in 1485, Hussey, C. J., had taken this stand in criminal cases;⁵⁵ and Coke reiterated it emphatically in 1628,⁵⁶ though his practice did not do justice to his theory. Hargrave (writing in 1775) says that it is undesirable to give opinions in advance of any case *already pending*.⁵⁷ Finally, in the eighteenth century, the judges have enunciated the principle that they will not be bound in actual cases argued before them by extra-judicial opinions previously given.

Lord Sackville's Case is the last advisory opinion the records disclose. Very likely the questioning of the judges by the

⁵³ Mansfield's Note in Lord Sackville's Case, 2 Eden, 371.

⁵⁴ See Mansfield's Note just quoted. And cf. Foster's criticism of Peacham's Case (written in 1762)—see note on p. 11 *supra*; Foster was one of the judges in Sackville's Case.

⁵⁵ Stafford's Case—see p. 9 *supra*.

⁵⁶ Inst. III, pp. 29-30.

⁵⁷ "But however numerous and strong the precedents may be in favor of the King's *extra-judicially* consulting the judges, on questions in which the crown is interested, it is a right to be understood with many exceptions, and such as ought to be exercised with great reserve, lest the rigid impartiality so essential to their *judicial* capacity should be violated. The anticipation of *judicial* opinions on causes *actually depending*, should be particularly guarded against; and therefore a wise and upright judge will ever be cautious how he *extra-judicially* answers questions of such a tendency.

. . . It would be a presumption in us, if we were to be more particular on a subject of so much delicacy, by attempting to mark the bounds to a right, the extent of which we do not find clearly ascertained by precedent or authority." Co. Litt. 110, Hargrave's Note. 5.

Crown is a practice "almost or altogether obsolete," desuetude for one hundred and fifty years having rendered "unconstitutional in the sense in which that term is understood in England, any attempt to repeat such an experiment," as has been suggested by the Judicial Committee of the Privy Council.⁵⁸ This is a purely academic question now, since under the Judicial Committee Act⁵⁹ already referred to, the king may obtain as good legal advice as can be had in England on any point whatsoever.⁶⁰ The Crown can ask for opinions on particular cases under this act and indeed has actually done so.⁶¹ It may be interesting to observe that the Local Government Act of 1888⁶²

⁵⁸ (1912) A. C. 571, at 586. But compare the opinion of Fitzpatrick, C. J., in 43 Can. S. C. R. 536 (1910): "The members of this court are the official advisers of the executive in the same way as the judges in England are the counsel or advisers of the king in matters of law. . . . In England the practice of calling on the judges for their opinion as to existing law is well established." He goes on to point out that the principal case does not call for the anticipation of a regular decision in court, and that the opinion if given would not be binding—cf. Mansfield in 1760.

⁵⁹ 3-4 Wm. IV c. 41, s. 4.

⁶⁰ Cf. (1912) A. C. 571, at 585.

⁶¹ In *re Schlumberger* (1853), 9 Mo. P. C. 1. Note especially the words of Dr. Lushington (speaking for the Committee) at p. 12: "The only construction which can be placed upon the fourth section of 3 and 4 Wm. IV c. 41 is a construction which shall give full and complete meaning to the words therein contained, without any limitation whatsoever. . . . Their Lordships are of opinion that there is enough in this reference not merely to justify, but absolutely to require them to proceed, because this is referred to them by an Order in Council . . . (which) falls within the . . . provisions of the Statute."

⁶² "If any question arises, or is about to arise, as to whether any business, power, duty or liability, is or is not transferred to any county council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may, on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned, be submitted for decision to the High Court of Justice in such summary manner as, subject to any rules of Court, may be directed by the Court; and the Court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question." 51-52 Vic. c. 41, s. 29.

provides that certain local executive bodies may refer questions of a particular nature to the High Court of Justice for a "decision." In *Ex parte County Council of Kent and Council of Dover*,⁶³ Lord Halsbury, L.C., held that no appeal lay from such a "decision." It is not a judgment, order of court or decree. The application is consultative only and may cover cases about to arise; furthermore it is to be without prejudice to other modes of trying the question.

But although the practice of referring questions to the judges is now obsolete (in the absence of statute), and although a modern Judicial Committee frowns upon the "earlier practice in bad times" as of no weight with them at the present time, especially in the light of disuse for one hundred and fifty years,⁶⁴ it is of great importance, for an understanding of the advisory opinion in the United States, that we should know what English statesmen, judges and legal writers deemed to be the legitimate practice, under the constitutional law of England in 1760. For, as the Massachusetts court pointed out in 1878,⁶⁵ the introduction of the advisory opinion clause in the constitution of Massachusetts of 1780 (its first appearance in the United States) "evidently had in view the usage of the English Constitution by which the King, as well as the House of Lords, whether acting in their judicial or in their legislative capacity, had the right to demand the opinions of the twelve judges of England." The form of the clause is explicable largely because of its English antecedents, and it is more than probable that certain important opinions (now regarded as "leading" in character) had their source in the practice of the English judges.

3. *The Judges as Advisers to the House of Lords in its Judicial Capacity.* The obligation of the judges to give advice in matters of law to the House of Lords when that body is acting as a court rests on the fact that they are members of the House and

⁶³ (1891) 1 Q. B. 725.

⁶⁴ (1912) A. C. 571, at 586.

⁶⁵ Opinion of the Justices, 126 Mass. 557.

consequently at its command. From the time of Edward I to the present day, the judges have been summoned to Parliament, along with the prelates and barons. They are not peers—the writ runs *cum prelatibus, magnatibus et proceribus*, not *cum ceteris prelatibus*, etc.;⁶⁶ but as members of the upper house it is their duty to give counsel to the king.⁶⁷ It must be remembered that the king dispensed justice in Parliament as well as in the various Councils, and the advice of the judges on such occasions would be especially desirable. Note particularly that the *commune concilium regni*, one of the most important founts of justice, was composed chiefly of the peers and the judges. Here, too, the learning of the judges could be drafted into service. Appeals lie either to this council or to Parliament.⁶⁸ A little later, this jurisdiction was restricted to Parliament alone,⁶⁹ but the habit of looking upon the peers in the *commune concilium* as judicial authorities seems to have discouraged the Commons from attempting to associate themselves with the upper house in exercising the judicial functions of the “king in Parliament.”⁷⁰ So this phrase, in a judicial sense, came to mean the king and the House of Lords.⁷¹ But gradually, in the fourteenth and fifteenth centuries the king ceased to sit with the House in judicial matters, and the House succeeded to (perhaps received by delegation⁷²) the final appellate jurisdiction of the “king in Parliament.” Meanwhile the position of the judges in this supreme court has been changing. Matthew Hale conjectured that at an early date they had a

⁶⁶ Maitland, C. H., p. 176.

⁶⁷ “The use of the words ‘tractaturi et consilium vestrum impensuri’ marks the theoretical position of the upper house and its attendant judges; they are counsellors preeminently; no such words occur in the writs under which the representative members are elected.” Stubbs, C. H., III, p. 393.

⁶⁸ Maitland, C. H., p. 136. Stubbs, C. H., II, pp. 272 sqq.

⁶⁹ Stubbs, C. H., III, pp. 476 sqq., especially note 2 on page 477.

⁷⁰ Stubbs, C. H., II, pp. 258-9.

⁷¹ Maitland, C. H., pp. 136 and 214.

⁷² Hallam, Mid. Ages, III, p. 144.

voice *in judicio*.⁷³ But before the end of the Middle Ages (Macqueen⁷⁴ says since Edward III) it was a settled principle that they had no vote and were only to give their opinions when asked.⁷⁵ Thus in 1403, when a petition from the Duke of Northumberland in the nature of a plea against a charge of treason was referred (qu., by whom?) to the justices for examination to get their counsel and advice, it was "contrary to the wish of the Lords, who thought judgment belonged to them alone."⁷⁶ And the king and Lords later gave judgment. Here there is evidence that the Lords feared that soliciting the advice of the judges might admit them to share in the judgment. But that has completely disappeared by the middle of the century, as may be seen from the Earl of Arundel's Case⁷⁷ and again in Thorp's Case.⁷⁸ In the latter case, the speaker of the Commons had been imprisoned upon a judgment in trespass, and the lower house petitioned the king and Lords that he be released under privilege of Parliament. The Lords stated the case to the judges and asked if Thorp should be set free; but the judges, after conference, replied that they should not answer the question or determine the privileges of Parliament, for this was a duty belonging to the Lords;⁷⁹ it was added, however, that if the same question were raised in a lower court (except in case of treason, felony, breach of the peace, or a condemnation by Parliament), the prisoner would be released to attend Parliament. The Lords declined to take the same course and commanded the Commons to elect another speaker.

⁷³ Hale's Jurisprudence, p. 59.

⁷⁴ House of Lords, pp. 36-7.

⁷⁵ Maitland, C. H., p. 84.

⁷⁶ Rot. Parl. 5 Henry IV, Nos. 11 and 12.

⁷⁷ See page 4 *supra*.

⁷⁸ Rot. Parl. 31 Henry VI, Nos. 25, 26, 27, and 28.

⁷⁹ The Lords, "to have knowlegge what the lawe will wey in that behalve, opened and declared to the Justices the premisses, and axed of theym whether the seid Thomas ought to be delivered from prison, by force and vertue of the Privelegge of Parlement or noo. To the which question,

In the Duke of York's Case (1460)⁸⁰ which involved the title to the throne, the judges were only too glad to keep out of the controversy altogether, and volunteered no advice at all. Two interesting points may be noted. They were not merely asked for an opinion as to the state of the law, but were requested "sadly to take avisament therin, and to serche and fynde all such objections as myght be leyde ayenst the same, in fortifyng of the Kynges right." This brought forth the excuse that they "have to determyne such maters as com before theym in the lawe, betwene partie and partie, and in such maters as been between partie and partie they may not be of Counseill."⁸¹ But they pleaded also that "in especiall the mater was so high, and touched the Kyngs high estate and regalie, which is above the lawe and passed ther lernyng . . . and therfore they humble bysought all the Lordes, to have theym utterly excused of eny avyce or Counseill, by theym to be yeven in that matier."

But in spite of these protests, there can be little doubt that in ordinary cases the judges were consulted frequently.

the chefe Justicez in the name of all the Justicez, after sadde communication and mature deliberation hadde amonge them, aunswere and said; that they ought not to aunswere to that question, for it hath not be used afore tyme, that the Justicez shuld in eny wyse determine the Privelegge of this high Court of Parlement; for it is so high and so mighty in his nature, that it may make lawe, and that that is lawe it may make noo lawe; and the determination and knowlegge of that Privelegge belongeth to the Lordes of the Parlement and not to the Justices."

⁸⁰ Rot. Parl. 39 Henry VI, No. 12. Fortescue, 384.

⁸¹ Baldwin (King's Council, p. 122), I think, misunderstands this. He interprets the second "partie and partie" as referring to political parties, whereas the emphasis is upon the contrast between determining matters before them and merely acting as counsel. He also says the judges were rebuked for their refusal because "they were the King's particular counsellors and therefore they had their fees and wages." But from the Rolls it seems this applies only to the Sergeants and Attorney who were also summoned as "Conseillers." This last point is not quite clear, but there seems to be no record of further replies from the judges.

During the seventeenth century, it seems they were in constant attendance upon the House of Lords, were even required to get a leave of absence to go upon their circuits, and were severely reprimanded for a failure to be present when their assistance was required.⁸² Coke recognizes the practice,⁸³ though with the qualification that it does not belong to them (the judges) "to judge of any law, custome or priviledge of Parliament." It will be remembered that the words of their writ of summons⁸⁴ do not even admit of this reservation. Apparently the opinions asked by the House of Lords on the petition for a writ of *habeas corpus* in the Aylesbury Case⁸⁵ were granted without question. Again in 1760⁸⁶ the Lords asked whether an earl whom they had convicted of murder should receive judgment under a certain statute, and whether, if the day first set for execution lapsed without execution, a new day could be set; and the judges replied promptly, the House of Lords acting in accordance with their opinion.

Just before the American Revolution, then, it was well settled that the judges were, in general, bound to give advice requested on questions of law arising in cases before the House of Lords as a court. It is doubtful whether, in strict law, they had a right to refuse under any circumstances. They had given opinions in concrete (not hypothetical) cases, though this practice did not persist much longer. They had disclaimed any jurisdiction in important cases of a political nature and in cases involving questions of Parliamentary privileges, though even here advice was appended to their disclaimers. There is no example of a failure to advise except the Duke of York's Case, and in that the House of Lords requested much more than judicial advice; even there the alternative excuse offered

⁸² Macqueen, House of Lords, pp. 37-40.

⁸³ Inst. IV, p. 50.

⁸⁴ See Note 67 on page 19 *supra*.

⁸⁵ 14 East, 92n. 14 Howell's St. Tr., 695.

⁸⁶ Ferrer's Case. Foster's Crown Law, p. 138.

by the judges did not deny their obligation to answer, but asserted their inability and lack of jurisdiction of such matters. The binding effect of their answers has not been discussed. Of course they would not be binding on the House of Lords because it was a superior court; and the question of their binding effect upon the judges could hardly arise, as the cases in which they were given could not very well come before the judges later.

A brief survey of the nineteenth century practice will not be amiss. It was accepted doctrine before the Judicature Act that the constitutional advisers of the House of Lords included the judges of the King's Bench and of the Common Pleas, the Barons of the Exchequer and the Master of the Rolls.⁸⁷ Since 1875, semble, the justices of the High Court have succeeded to this duty.⁸⁸ They do not attend regularly and usually by special order only.⁸⁹ Since it has become the settled practice of the House that only "law lords" are to sit in appeal cases, and especially since the legal ability of the court has been assured by the statute of 1876 which requires that three "law lords" must be present, the consultation of the judges has become increasingly infrequent. It took place in one hundred and twenty-five cases from 1827 to 1899, only four of which were later than 1876.⁹⁰ The last important example within my knowledge is the great case of *Allen v. Flood*, (1898) A. C. 1; but the judges were also consulted in *The Trial of Earl Russell*, (1901) A. C. 446.

Of course the opinions of the judges are not binding upon the House, even when they are unanimous. "The House pays great regard to the opinions of the Judges, especially when concurrent; but the House cannot transfer to others the

⁸⁷ Macqueen, *House of Lords*, p. 35.

⁸⁸ Maitland, *C. H.*, p. 84.

⁸⁹ For the details as to procedure when the judges are summoned to attend to give advice, see Macqueen, *House of Lords*, pp. 256-8, 416.

⁹⁰ *V. V. Veeder in Harv. L. R.* XIII, 358.

constitutional responsibility which attaches to the adjudication of causes in the court of last resort."⁹¹ But as a matter of fact it is claimed that only in five cases in recent times has the House given judgment contrary to the opinion of a majority of the judges.⁹²

In contrast to the earlier practice, explicit decisions of concrete cases are never given. The judges do not even suggest judgments, but merely give their opinions on abstract questions of law propounded by the House; "but the questions propounded are usually so framed as to embrace *abstractedly* all the difficulties of the particular case in hand."⁹³ On the other hand, it seems to be the better opinion that the questions put to the judges must relate to the case before the House. In *Bright v. Hutton*⁹⁴ an appeal was taken on the question of the amount of contribution payable by a company in winding-up proceedings. The judges were ordered to attend, and when the case came up for argument, the Lords requested a preliminary discussion as to whether the company in question came within the Winding-Up Acts. Both counsel protested that this was not within the scope of the appeal and Lord Brougham replied: "We have now the advantage of the attendance of the Judges; we frequently put questions to them besides those which are the questions in the cause. . . . We

⁹¹ Macqueen, *House of Lords*, pp. 49-50. Compare the words of Eldon, L. C., in *Head v. Head* (1 Turner and Russell, 138, at 140): "The answers given by the Judges therefore, although entitled to the greatest respect, as being their opinions communicated to the highest tribunal in the Kingdom, are not to be considered as judicial decisions."

⁹² V. V. Veeder in *Harv. L. R.* XIII, 358.

⁹³ Macqueen, *House of Lords*, pp. 47-8. And compare *Head v. Head* (1 Turner and Russell, 138), per Eldon, L. C., at p. 140: "Now it is well known that the questions proposed to the Judges by the House of Lords, though made to approximate so nearly to the questions to be determined, as to enable the House to form a judgment on the case actually before it, cannot be the very questions which the House is called upon to decide."

⁹⁴ 3 H. of L., 341.

are not bound by the form of an appeal as to any questions we may think fit to put to the Judges." The point was then argued and the judges held that the company came within the acts. Lord Brougham then explained that if the judges had held the contrary opinion and the House had agreed with them, they should not have gone on with the case, but as it was, argument would be heard on the point under appeal. So it appears that the question first submitted to the judges here was really necessary to the case, and Lord Brougham, in the words cited above, apparently only meant that the House could put questions collateral to the case in hand. It is unhesitatingly stated by the House in (1912) A. C. 571, at 585, that the House may ask "such questions as it may think necessary for the decision of the particular case. That is a very different thing from asking questions unconnected with a pending cause as to the state or effect of the law in general."

4. *The Judges as Advisers to the House of Lords in its Legislative Capacity.* In the Anglo-Norman period, as observed above (see p. 1), large powers of legislation were vested in the king and his *Magnum Concilium*.⁹⁵ The judges, as members of this *Concilium*, not only advised as to legislation, then, but actually participated in its enactment. Legally, their power was coextensive with that of the peers; they were all summoned for the same purpose, namely, *colloquium habere et tractatum*. Possibly the omission of "*ceteris*" and "*fide et homagio*" and the insertion of "*ceterisque de consilio nostro*," are to be interpreted as modifying their perfect equality with the Lords in debate.⁹⁶ From whatever cause, it is true that in the course of time the judges confined their participation to interpreting existing law and giving advice in the framing of pending legislation, but did not share in its enactment.⁹⁷ This seems to be an excellent arrangement, the judges performing those functions for which

⁹⁵ And see Hallam, *Med. Ages*, III, p. 143.

⁹⁶ Stubbs, C. H., III, p. 395.

⁹⁷ Stubbs, C. H., III, pp. 445-6.

they were best fitted, while the Lords passed upon the questions of policy involved. Before long the Commons were admitted to share in the work of legislation,⁹⁸ but this had no effect on the advisory position of the judges.

During the seventeenth and eighteenth centuries they were consulted quite freely, especially on questions concerning pending legislation, or possible legislation. When the Commons in 1614 passed a declaration against the king's right to impose taxes at the outposts and asked the Lords for a conference on the subject, the Lords first requested the opinion of the judges on the subject of these impositions. The opinion was refused, but, as Hallam conjectures,⁹⁹ this may have been due to Coke's dislike for Egerton, L. C., who had moved to consult the judges.¹⁰⁰ On the other hand, the judges freely gave their opinions on the construction of pending bills on November 30, 1621 (on the third reading of the Ordinance Act), on March 9, 1623 (on the third reading of a Lord's Day Act), on March 10, 1623 (after the passage of a defective bill by the Lords), on May 1, 1624 (on the Bill of Grace for Wales), on July 9, 1669 (on the second reading of a bill for reversing a King's Bench judgment), on May 9th and 12th, 1690 (on the third reading of Commons amendments to a bill; here they suggested the insertion of certain words) on May 12, 1711 (on the second reading of a bill re *Mandamus* and *Quo Warranto*), on March 6, 1717 (on the *Forfeited Estates Bill*), on December 22, 1718 (on the *Schism Act*), on January 17, 1719 (on a *Corporation Bill*), on May 18, 1720 (an adverse opinion on an *Insolvent Debtors Bill*), and on April 29, 1723 (on a bill to inflict pains and penalties on John Plunket).¹⁰¹ In the case of the *Schism Act*, the Lords said it was "usual to ask the Judges opinions of

⁹⁸ Stubbs, C. H., II, pp. 257 sqq.

⁹⁹ C. H., I, p. 340n.

¹⁰⁰ *Lords' Journal*, May 23, 1614.

¹⁰¹ Macqueen, *House of Lords*, pp. 53-57.

the consequences of repealing or making any law."¹⁰² What appears to be an opinion concerning possible legislation is the case in *Michaelmas Vacation, 1721*, when the House asked the judges whether the king could prohibit the building of war ships in his dominions; the judges were of opinion that he could not. "This question was asked on occasion of ships built and sold to the Czar, being complained of by the Minister of Sweden."¹⁰³ The only hint of a refusal to reply by the judges is the case in *May, 1758*, where Lord Chief Justice Willes told the House the judges were ready to answer nine of the ten questions submitted, but asked to be excused from answering number 3 (concerning the operation of a proposed bill and its effect upon the subject), in which request the House acquiesced.¹⁰⁴ The House, it seems, was both considerate and careful in exercising the privilege of consultation. In the *Schism Act case*,¹⁰⁵ the *Lords* opposed the second question as originally framed, as touching upon "what might judicially come in question in Westminster Hall," and the Lord Chancellor altered the question; and certain members of the House objected to the third question for a similar reason, and it was voted to withdraw it. Macqueen¹⁰⁶ cites two cases (in 1783 and 1788) in which motions to refer questions to the judges were voted down. In at least one case,¹⁰⁷ the judges excused themselves from replying to a question, about a pending bill, "it being likely the case would come before them in the courts below." The House was not favorably impressed with this attitude, however, and the "matter of the Judges" was debated on an appointed day and its further consideration only prevented by a prorogation.

In 1760, then, it is an unquestioned rule that the judges are to answer inquiries put to them concerning bills already

¹⁰² Fortescue, 385.

¹⁰³ Fortescue, 388.

¹⁰⁴ Macqueen, *House of Lords*, p. 57.

¹⁰⁵ *Ubi supra*.

¹⁰⁶ *House of Lords*, p. 57.

¹⁰⁷ Macqueen, *House of Lords*, p. 52.

introduced into the House of Lords, or in contemplation. There is a little authority for saying that they may refuse to pass on questions which will come before them in their judicial capacity. The House on the whole is sparing with its references, and usually follows the advice of the judges.

New questions were raised in the nineteenth century. In 1834, an application was made to Parliament for a bill to incorporate a certain L. and W. B. Company. Such a bill passed the House of Commons and had come up for a second reading in the House of Lords, when it was moved that counsel be heard on the subject and that the judges be ordered to attend. A day was set and a question stated: "Are the provisions of this bill inconsistent with the Bank of England's rights as secured to it under the following acts" (naming seven statutes)? The judges attended, but after a short conference together, reported (through Tindal, C. J.) that "His Majesty's Judges, after considering the question which has been proposed to them, find it proposed in terms which render it doubtful whether it is a question confined to the strict legal construction of existing Acts of Parliament; and they therefore, . . . request to be excused from giving an answer."¹⁰⁸ With due respect for the learned judges who shared in that opinion, it is submitted, on the facts disclosed above, that this position is untenable. The construction of pending bills has been the most frequent practice of the judges as legislative advisers to the House of Lords. A more elaborate demurrer was advanced in *McNaghten's Case* (1843).¹⁰⁹ A verdict of Not Guilty had been returned to an indictment for murder, the defense being insanity; and the question of the extent of insanity that would be a good defense to such an indictment was made the subject of a debate in the House of Lords. They summoned the judges to attend on a given day, and put to them five questions on the existing law of insanity as a defense. Maule, J., objected to answering on

¹⁰⁸ In re London and Westminster Bank, 2 Cl. and Fin. 191.

¹⁰⁹ 10 Cl. and Fin. 200.

three grounds: (1) The generality of the questions, not referring to any particular case. (2) The lack of arguments by counsel. (3) The embarrassment that might be caused in the administration of justice.¹¹⁰ However, since his brethren disagreed with him on this point, he submitted an answer in general terms. Tindal, C. J., and the other judges subscribed to the validity of these objections, but thought an answer should be given. In commenting on the answers,¹¹¹ the Lords with one voice asserted their undoubted right to require opinions on abstract questions of law; such questions are not mere matters of speculation, for the House of Lords may be called on to change the law. Lord Cottenham indulges in the dictum that opinions on a pending bill cannot be required, but he was undoubtedly relying on *In re London and Westminster Bank*.

Perhaps *McNaghten's Case* is the last instance of legislative

¹¹⁰ The questions raised here are especially interesting in view of the principles developed by State courts in the United States—see later. Perhaps they are the result of American influence.

¹¹¹ "Generally speaking, it is most important that in questions put for the consideration of the Judges, they should have all that assistance which is afforded to them by an argument by counsel: but at the same time there can be no doubt of your Lordships' right to put . . . abstract questions of law to the Judges, the answer to which might be necessary to your Lordships in your legislative capacity."—per Lord Brougham.

"It was most fit that the opinions of the Judges should be asked on these matters, the settling of which is not a mere matter of speculation; for your Lordships may be called on, in your legislative capacity, to change the law."—per Lord Campbell.

"It is true they cannot be required to say what would be the construction of a Bill, not in existence as a law at the moment at which the question is put to them; but they may be called on to assist your Lordships, in declaring their opinions upon abstract questions of existing law."—per Lord Cottenham.

Lord Wynford also says that he never doubted the power of the Lords to ask opinions on questions of existing law, and that he gave such opinions himself when in the Common Pleas; and the Lord Chancellor agreed as to all these comments.

consultation. Cases in the last century are rare.¹¹² But the right to such consultation doubtless still exists.¹¹³ At least the Judicial Committee thought so in 1912:¹¹⁴ "There is also authority for saying that the House of Lords possesses in its legislative capacity a right to ask the judges what the law is in order to better inform itself how, if at all, the law should be altered. The last instance of this being done occurred some fifty years ago,¹¹⁵ when the right was expressly asserted by Lords of undoubtedly high authority."

B. IN UNITED STATES

1. *When Authorized by the Constitution*

a. *Massachusetts.* The advisory opinion was formally introduced into the American constitutional system by the Massachusetts Constitutional Convention of 1780.¹¹⁶ Even before this time it is quite possible that irregular solicitation of judicial advice was not unknown.¹¹⁷ Perhaps, too, the early colonial practice of consulting the Plymouth and Massachusetts Bay clergy may have helped to familiarize the people with the advisory system.¹¹⁸ Washburn tells us¹¹⁹ that formal appeals

¹¹² Cf. the opinion of the court in 126 Mass. 557: "The right of the House of Lords to put abstract questions of law to the judges, the answer to which might be necessary to the House in its legislative capacity, has been often acted on in modern times."

¹¹³ Though Maitland apparently has forgotten it—C. H., p. 84.

¹¹⁴ (1912) A. C. 571, at 585-6.

¹¹⁵ This probably refers to McNaghten's Case.

¹¹⁶ For the text of the provision see Appendix I.

¹¹⁷ "In Massachusetts, in colonial days, the governor and the council claimed and exercised the same prerogative (i.e., as the king and House of Lords in England) and the colonial judges seem to have acquiesced." Emery, C. J., in 2 Maine Law Review, 1.

¹¹⁸ I am indebted to Dr. C. K. Maxson of the University of Pennsylvania for this suggestion. "It was the custom of the General Court," he writes, "to refer questions of law to the preachers who wrote out learned opinions. Their citations were, of course, mostly from the Mosaic law and other parts of the Bible. You may see many illustrations of this custom in the Bradford history. The same custom obtained in Massachusetts Bay."

¹¹⁹ Judicial History of Massachusetts, p. 21.

for advice were made to the clergy by magistrates "until 1682, when, for the last time, they were consulted in relation to the surrender of the charter (1 Hutch. 303, n.)." Unfortunately the only examples he gives are cases of voluntary interference and gratuitous advice from the preachers of the colony. But whether solicited or not, such advice was doubtless very desirable, for apparently no one connected with the court in those early days had had a legal education.¹²⁰ Still the influence of this practice upon the introduction of the full-fledged advisory opinion in 1780 in all probability was relatively insignificant. Under the Royal governors there certainly was no magisterial consultation of the clergy. Justice was almost entirely in the hands of the governor, and members of his council commonly acted in a judicial capacity.¹²¹ The judiciary was first clearly separated in theory from the executive and legislature in the charter of 1691;¹²² but even after this, the same person could be both judge and councilor at the same time.¹²³ Executive consultation of such an ill-defined and immature judiciary passes almost unquestioned, as we saw in the case of England. So the seed of the advisory opinion in Massachusetts may have been sown both by ecclesiastical and governmental practice in the colony.

However this may be, there can be little doubt that the Massachusetts advisory opinion owes its form at least to the influence of English practice. It bears many evidences of that influence. In the first place, the clause as first reported to the convention limited the consultative power to the governor and council, and upper house, the counter-parts of the king and House of Lords, and the privilege was only extended to the house of representatives by amendment on the floor of the

¹²⁰ *Ibid.*, Chapters 1-5, *passim*.

¹²¹ *Ibid.*, Chapter 6.

¹²² *Ibid.*, p. 139.

¹²³ *Ibid.*, p. 159.

convention.¹²⁴ Again, as has been observed already, the English judges were on record as objecting to the giving of opinions (at least in administrative matters) except in cases of manifest and urgent necessity;¹²⁵ while Hargrave¹²⁶ had stated that the right of extra-judicial interrogation was "a right to be understood with many exceptions, and such as ought to be exercised with great reserve." Correspondingly, opinions of the Massachusetts justices can be required only "upon important questions of law and upon solemn occasions." Note, too, that as there is no distinction between legislative and judicial questions in England either in the case of the king or of the House of Lords, so there is no distinction here. Of course, the adoption of the principle of separation of powers left few judicial duties to either the governor or the legislature.

These intrinsic evidences of English influence are corroborated by the circumstances attending the formulation of this article of the constitution. In its original form it would seem to have been the work of John Adams. The convention chose a committee of thirty (or thirty-one?) to draft a constitution after general discussion from the floor. This committee appointed a sub-committee of three—James Bowdoin, Samuel Adams and John Adams—and they in turn delegated the task of preparing the draft to John Adams.¹²⁷ With the exception of a few minor alterations in committee, the constitution reported to the convention was his work. He frankly claims to be the drafter of the Massachusetts constitution of 1780.¹²⁸ The importance of his authorship, for the present purpose, is that he was a lawyer and well versed in English

¹²⁴ See Jour. of Mass. Const. Conv. of 1779-80, pp. 211, 85-86.

¹²⁵ Mansfield's Note in Lord Sackville's Case, 2 Eden, 371.

¹²⁶ Co. Litt., 110. Hargr. n. 5.

¹²⁷ Jour. Mass. Const. Conv. 1779-80, pp. 28-30; Adams' Works, IV, pp. 215-216.

¹²⁸ Walsh, Political Science of John Adams, p. 7n; and see Adams' Works IV, pp. 185-187, 193-200, 203-209 and 219-267; also his correspondence of this period in Vol. IX of his Works.

judicial practice.¹²⁹ In his discussion with General Brattle concerning the Independence of the Judiciary, he mentions a secret consultation of the judges by the king in Sir Edward Hale's case.¹³⁰ As his grandson says, "his education, his professional studies, and his habits of generalization led him to favor the main features of the British form of government."¹³¹ When we couple these facts with the peculiarly English touches of the article, as pointed out above, we may fairly conclude that John Adams fathered the advisory opinion in the Massachusetts constitution, and that it was a deliberate formulation of the existing English practice as he understood it.

It may be thought queer that the advisory opinion clause should be adopted by a convention so dominated by the theory of Montesquieu. Probably there was no intention to interfere with the independence of the judiciary;¹³² the framers of the clause aimed merely at securing coordination between the departments of government, and promoting a uniformity of interpretation that would make for greater justice and efficiency.¹³³ Certainly, as will be seen, the device in operation has not impaired the independence of the judiciary to any appreciable extent. Whether it affects the independence of the other departments is a question that will be discussed later.

The first opinion under the advisory opinion clause was given in 1781, at the joint request of the senate and house of representatives.¹³⁴ The judges expressed themselves as being honored by the reference, and their advice was followed by

¹²⁹ Adams' Works, III, pp. 519 sqq., and *passim*.

¹³⁰ *Ibid.*, III, pp. 529-530.

¹³¹ Life of John Adams by Charles Francis Adams in Adams' Works, I, at p. 287.

¹³² See The Duty of Judges as Constitutional Advisers, by H. A. Du-
buque, in Am. L. Rev. XXIV, 369, at p. 374.

¹³³ Note that John Adams himself was a strong advocate of the separation of powers. See his Works, *passim*, and Walsh's Political Science of John Adams, pp. 20 sqq.

¹³⁴ Opin. of Justices, 126 Mass. 547.

the houses in their subsequent action. In 1784 a question was put by the senate as to whether the legislature had a constitutional right to fill vacancies in the council, and the judges made a brief reply.¹³⁵ The next case (1787) of which I have found any record was a reference by the legislature of a memorial from the French consul; the judges, "for substantial reasons," declined giving an extra-judicial opinion. The same year, an opinion was given to the senate as to the legislature's power to commute punishment.¹³⁶ In 1791, the senate submitted several questions concerning the passage of bills, and in 1807 the governor referred a question on elections.¹³⁷ These six were the only cases under the clause before 1810. Only eleven in all are reported from 1780 to 1830. Since that time opinions have been requested with increasing frequency. The total number to December 1, 1917, is one hundred and five. Of these the house and senate jointly are responsible for ten, the house alone for forty, the senate alone for twenty-three, the governor and council for twenty-four, the governor alone for six, and the council alone for two.

Apparently the judges and reporters did not attach much importance to the early opinions. In no case do they appear in their proper chronological place in the reports. The 1781 case was not incorporated therein till 1879.¹³⁸ Two cases (1791 and 1807) were transferred from the newspapers to 3 Massachusetts 567, 568, in 1807.¹³⁹ The 1784 case and one of the 1787

¹³⁵ Opin. of Justices, 14 Mass. 470.

¹³⁶ Opin. of Justices, 14 Mass. 472.

¹³⁷ Opin.s of Justices, 3 Mass. 567, 568.

¹³⁸ Opin. of Justices, 126 Mass. 547.

¹³⁹ An explanatory note by the reporter says: "The two following documents containing the solemn opinion of the court upon questions duly submitted to their consideration, pursuant to the constitution, chapter 3, article 2, it was though expedient to transfer them from the newspapers, in which they were published, into the Reports, that a more easy and general access may be had to them, should any future discussions arise on the same subjects."

cases were included in 14 Massachusetts in 1817; the other 1787 case is not yet on the official records. Even very much later opinions are not in their proper order. One of 1825 is reported in 1829,¹⁴⁰ one of 1840 in 1849,¹⁴¹ one of 1833 in 1850,¹⁴² one of 1837 in 1861,¹⁴³ and one of 1839 in 1850.¹⁴⁴

Yet in spite of this apparent neglect and the infrequent application of the clause there was a strong feeling in the convention of 1820 that it should be repealed. Among the delegates of this convention were many prominent members of the bench and bar—Parker, who was chief justice 1814-30; Jackson, who was justice 1813-23; Shaw, who was to be chief justice from 1830 to 1860; Lincoln, who became justice in 1824; Story, a justice of the United States Supreme Court; Daniel Webster; and John Adams, who is reported to have drafted the constitution of 1780. The committee on the judiciary, through its chairman, Mr. Justice Story, reported a recommendation that the advisory opinion scheme be dropped.¹⁴⁵ In arguing for the recommendation, Story emphasized the importance that the judiciary should be independent, and the great danger that they would have to give opinions in cases "exclusively of a political character." Furthermore the scheme deprived individuals of the right of being heard and of the right of trial by jury. In times of political excitement the judges might be consulted when it was certain their opinions would not suit the popular sentiment and "with the very view to make them odious and to effect their removal from office."¹⁴⁶

¹⁴⁰ Opin. of Justices, 7 Pick. 125, 130n.

¹⁴¹ Opin. of Justices, 3 Cush. 584.

¹⁴² Opin. of Justices, 6 Cush. 573.

¹⁴³ Opin. of Justices, 1 Allen 197n.

¹⁴⁴ Opin. of Justices, 6 Cush. 575.

¹⁴⁵ Deb. Mass. Conv. 1820, 489-90.

¹⁴⁶ Probably he is referring to the opinion in 8 Mass. 548, of which ex-Justice Morton said, in 1853: "When the war of 1812 was in progress, a question arose which agitated the whole community, a question about which there was more excitement than there ever had been before, or will

Also, "as the constitution now stands, the judges are bound to give their opinions if insisted upon, even in a case where private rights are involved, and without the advantage of an argument." He indicated that the recommendation was practically unanimous, and, without further debate, it was agreed to in the convention "by a large majority." The salient parts of Story's argument were incorporated in an Address to the People¹⁴⁷ which accompanied the proposed amendment. Unfortunately we are unable to know the sentiment of the people of Massachusetts as to the advisory opinion at that time, for the suggested repeal was combined with a provision that all judicial officers may be removed by the governor with consent of council upon the address of a majority of each house of the legislature, after notice to the person concerned (a provision that was debated at great length and met with much opposition in the convention), the two provisions making up Amendment IX. The vote on this amendment was 12,471 pro, 14,518 contra.¹⁴⁸

The attempt at repeal was repeated in the Convention of 1853, and apparently again at the instigation of the legal pro-

be likely to exist for half a century to come; the question in relation to calling out the militia was got before the supreme court in some manner, I do not recollect how, and they gave an opinion which produced an immense excitement in the community, and which was arraigned throughout this state, and throughout the United States, which opinion was reversed by the whole court of the United States, and which opinion would have destroyed the utility and confidence in this court in this Commonwealth, had it not been founded upon a basis which could not be shaken, and had it not been supported by a law-loving community." Deb. Mass. Conv. 1853, II, 694.

¹⁴⁷ Deb. Mass. Conv. 1820, 629.

¹⁴⁸ *Ibid.*, 633. Jameson (Constitutional Conventions, p. 669) comments: "In Massachusetts, therefore, a proposition which received the approval of the leading lawyers and judges of the Convention, of all parties, and which involved simply a legal or constitutional question, was voted down by a majority consisting largely of farmers, mechanics, and tradesmen." But Jameson overlooks the possible effect of the second proposed change in defeating the whole amendment.

fession. Marcus Morton, Jr., (who was elevated to the Supreme Bench in 1869) introduced an order that the committee on the judiciary inquire into the expediency of retaining the advisory opinion clause.¹⁴⁹ This committee was composed of Marcus Morton, Sr., who had been a justice of the Supreme Court 1825-39; Greenleaf, the official reporter in Maine 1820-32; Lord, a Supreme Court justice 1859-75; Chapin, a lawyer, who became probate judge in 1858; Choate, a lawyer; and eight members of unknown qualifications.¹⁵⁰ The chairman (Marcus Morton, Sr.) reported a recommendation that the governor and legislature should not have the right to require opinions of the judges.¹⁵¹ In opening the debate he emphasized the separation of powers principle, the importance of keeping the judiciary out of the "vortex of politics," and the *ex parte* character of opinions involving private rights.¹⁵² Mr. Lord added that the clause permitted "the legislative or executive department of the government to put, in many important instances, the whole responsibility of their action upon the judicial department" and besides "it is very little different from permitting the judiciary to control the legislative and executive powers."¹⁵³ In reply, statements were made by Mr. Warner, Mr. Hooper and Mr. French that the scheme had worked well in practice, that no evil had resulted, that it secured a desirable uniformity of action in questions under the constitution and that "the supreme court of the State can render no better service to the Commonwealth than in answering such questions as may be propounded to them by the legislature."¹⁵⁴ The recommendation came from a unanimous committee and was adopted by the convention after a short debate. The sentiment of

¹⁴⁹ Deb. Mass. Conv. 1853, I, 160.

¹⁵⁰ *Ibid.*, I, 89, and Appleton's Cyc. of Amer. Biog. *sub nom.*

¹⁵¹ *Ibid.*, I, 447.

¹⁵² *Ibid.*, II, 685.

¹⁵³ *Ibid.*, II, 687.

¹⁵⁴ *Ibid.*, II, 686.

the people is again unascertainable, however, for the repeal was only one of many changes in the revised constitution, which was rejected, 63,222 to 68,150.¹⁵⁵ Probably it was not considered a point of great importance, for it is not discussed at all in a pamphlet "On the Proposed Constitution 1853" by G. T. Curtis, Samuel Hoar, Marcus Morton, C. F. Adams and others.

The advisory opinion has now become an unquestioned fixture in the Massachusetts system. There is no disposition on the part of the governor or legislature to forego the advantages of its use. Since 1890, fifty-one such opinions have been reported—twenty-nine of them since January 1, 1910. Certain well-defined rules of construction and application have been worked out, some of them limiting the clause in important particulars; most of this elaboration belongs to the period since 1877, when the justices, in an opinion of almost revolutionary character, asserted a claim to considerable discretion in refusing their advice.¹⁵⁶ Several principles regarding the juridical nature of advisory opinions have been clearly enunciated. These will be disclosed in the detailed analysis to follow.

As to the effect of the scheme in Massachusetts, I can not do better than quote from a recent book from the pen of a Massachusetts writer: "The system of advisory opinions has also worked well. The Massachusetts supreme court vetoes fewer legislative enactments than the supreme court of any other of the larger states. This relatively infrequent use of the judicial veto may be partly explained by the absence of most of the constitutional limitations upon legislative powers and procedure which abound in the constitutions of many states. But it is to no inconsiderable degree the result of the legislative and executive practice of calling upon the supreme court for their opinion concerning the constitutionality of proposed measures, when their constitutionality is questionable,

¹⁵⁵ *Ibid.*, III, 768.

¹⁵⁶ Opin. of Justices, 122 Mass. 600. See pp. 167-70 *infra*.

in advance of their enactment into law. Often there are several such requests for advisory opinions in the course of a single legislative session. The opinion of the court is invariably accepted. When the opinion is adverse to the constitutionality of a proposed measure, the legislature may, if it chooses, proceed thereafter by means of a constitutional amendment. This has been done in several cases. More frequently the measure is dropped."¹⁵⁷

b. *New Hampshire*. New Hampshire evidently borrowed the clause from Massachusetts, for the text in the constitution of 1784¹⁵⁸ follows the wording of the constitution of the latter state, except that "governor" is replaced by "president" and "supreme judicial court" by "superior court." The clause is repeated in the constitution of 1792, the word "governor" now being used, and this wording is unchanged in the constitution of 1902.

No trace of an application of the scheme is discoverable before 1816, when the governor and council appealed to the justices to determine the constitutionality of the legislation amending the Dartmouth College charter, and the power of the governor and council under such legislation. A reply to the first question was refused on the ground that it affected private rights which might later come before the court in a regular action. As was the case in Massachusetts, this opinion was not reported until much later.¹⁵⁹ Only four opinions are recorded as given before 1850 and but nine more from 1850 to 1870. The total to December 1, 1917 is forty-nine. Of these, twenty were in response to interrogations from the house, nine were given at the request of the senate, eighteen

¹⁵⁷ Holcombe, *State Govt.*, p. 381.

¹⁵⁸ For the text of the provision see Appendix I.

¹⁵⁹ *Opin. of the Court*, 62 N. H. 704, (1882). Three other opinions are not in chronological order: one of 1865 was reported only in 1874 (*Opin. of Justices*, 53 N. H. 634); one of 1877 in 1882 (*Opin. of Justices*, 62 N. H. 706); and one of 1889 in 1912 (*Opin. of Justices*, 76 N. H. 612).

at the request of the governor and council, and two at the request of the governor alone.

The interpretation and application of the clause have differed from the Massachusetts practice only in that the judges have been more generous in exercising the discretion claimed for them, as will be seen later. The writer has been unable to ascertain the effect of opinions in determining the action of the executive and legislative departments, but the inclusion of the clause in the constitution of 1902 would go far to indicate a general satisfaction with its operation in the past; for in general, the judiciary committees of constitutional conventions, composed mostly of legally trained men, oppose the practice as contrary to certain traditional theories of law and the judicial function. This has been illustrated in the conventions of 1820 and 1853 in Massachusetts, and will be further exemplified in other cases.

c. *Maine.* The next State to adopt the advisory opinion was Maine, in the constitution framed upon its separation from Massachusetts in 1820.¹⁶⁰ The influence of the constitution of the older State would naturally be an important factor in determining the content of this new charter of government. But it is interesting to observe that the new State made the clause part of its constitutional system the very year when a convention in the parent State was urging that it be eliminated from theirs. The wording has been modified slightly however. One change should be noted. The Massachusetts clause gives the power of consultation to "each branch of the legislature, as well as the governor and council." The governor alone had exercised the power in 1807,¹⁶¹ and several other replies were given, either to the governor or to the council,¹⁶² before the justices expressed a doubt as to whether the consti-

¹⁶⁰ For the text of the provision see Appendix I.

¹⁶¹ *Opin. of Justices*, 3 Mass. 568.

¹⁶² *In re Opin. of the Justices*, 211 Mass. 620, and *In re Opin. of the Justices*, 211 Mass. 630.

tution authorized such replies, a doubt resolved against the governor in 1913.¹⁶³ Under the Maine constitution this question cannot arise, for authorized requests may come from "the governor, council, senate or house of representatives." The clause, as reported from the committee, was adopted unanimously by the convention.¹⁶⁴

The executive and legislative departments were not slow to avail themselves of the advantages of judicial advice. The first opinion was given in 1821, and twelve are on record before 1840. The use of the scheme has been steady, though not very frequent, and the cases are well scattered. During the ninety-seven years of its operation, fifty-six opinions in all have been reported. These are distributed among the different interrogators as follows: house, sixteen; senate, eleven; governor, seventeen; council, seven; governor and council jointly, five. They have been reported with reasonable promptness, though the opinions in 3 Maine, 477, and 3 Maine, 481, are of earlier date than the opinion in 2 Maine, 439.¹⁶⁵

No information is available as to the success or failure of the device in Maine, but the writer is not aware of any attempt to do away with it. The judges have seemed favorably disposed to it and there are very few refusals to answer, as compared with other States. The interpretation of the clause has been similar to that of Massachusetts and New Hampshire, with the exception of the doctrine of 70 Maine, 570, which can better be considered at another place.

d. *Rhode Island*. When Rhode Island tardily substituted for her charter of 1663 a constitution (in 1842) of more modern content, she was sufficiently impressed by the advisory opinion scheme of her New England neighbors,¹⁶⁶ to borrow it for her

¹⁶³ In re Opin. of the Justices, 214 Mass. 602.

¹⁶⁴ Debates, etc. of Conv. of 1819, Perley, p. 175.

¹⁶⁵ Also an opinion of 1871—Opin.s of the Justices of the Supreme Judicial Court, 64 Me. 588—was accidentally overlooked until 1875.

¹⁶⁶ Thayer (Cases on Constitutional Law, I, p. 183 n.) thinks it quite possible that the judges in Rhode Island at least gave extra-judicial advice

own use.¹⁶⁷ But important changes appear in the version of this State. No council was created by the new constitution, so the power of consultation rests in the governor or either house of the general assembly. But the "important question and solemn occasion" qualification has disappeared; the judges are to give their opinion upon "any question of law." The importance of this change may be seen from the fact that, though references on rather trivial and unnecessary points have not been lacking, there is no record of a refusal to give an opinion requested. The desirability of so comprehensive a requirement may well be questioned (see Chap. III). Also, the constitution explicitly states that the opinion must be in writing. This is probably a cautious superfluity, for the existing practice was to give written opinions, however brief, and there is no reason to suppose that the careful lawyers who attain the highest judicial honors in our States would be inclined to do otherwise.

No opinions were requested for twelve years, as far as the records disclose, the first one being Opinion of the Supreme Court, 3 Rhode Island, 299. The forty-six cases in the reports are well distributed from 1854 to date, except for a gap from 1858 to 1877. They are reported promptly, with one exception.¹⁶⁸ The legislative department seemingly has not taken much interest in the scheme—one request has come from the general assembly, three from the house and nine from the senate, the governor being responsible for the other thirty-three. The cases are of a humdrum type, and the opinions commendably brief but monotonously uninteresting. The justices have

in colonial times, inferring this from the statement of Howell, J. in *Trevett v. Weeden*, Thayer, Cases, I, p. 73: "The court was ever ready, as constituting the legal counsellors of the State, to render every kind of assistance to the legislative, in framing new or repealing former laws."

¹⁶⁷ For the text of the provision see Appendix I.

¹⁶⁸ In re Election of School Committee, 28 R. I. 629. Also the arrangement of the opinions in 4 R. I. is not chronological.

accepted the clause as it stands, and anyone is free to indulge in its interpretation without reference to judicial precedent. The opinions are void of any contributions to the theory of the judiciary department in the American system. Perhaps this is the inevitable result of a clause as broad as this one is; perhaps it testifies to a more generous cooperation of the judges with the other departments. In any case, it seems to be the opinion in Rhode Island that the scheme is a success, for the advisory opinion was reaffirmed in a judicial amendment (Amendment XII, Section 2) which was adopted November 3, 1903.¹⁶⁹

e. *Missouri*. Heretofore the advisory opinion has been confined to the New England States. The historical explanation of its long leap to the Mississippi Valley is wanting. Possibly it was due to the efforts of lawyers or others who had been brought up in the original habitats of the device, and later turned their faces westward. This first transplanting was an unsuccessful experiment, for environment and culture were both adverse. An adequate conception of the origin, history and purpose of extra-judicial consultation was lacking and the deficiency foredoomed failure.

The clause in question was incorporated into the constitution in 1865.¹⁷⁰ Two new elements were introduced. Opinions must be given only upon "important questions of *constitutional* law, and upon solemn occasions." The effect of this change must not be over-estimated. Most questions of statutory law, if "important," could be brought within the "solemn occasion" provision, if the latter were not too strictly construed. Quite likely the chief intention of the framers of this clause was to provide a means for the judges to pass upon the constitutionality of measures before, instead of after, enactment. The other new element is a direction that all opinions given under the clause "shall be published in connection with the reported decisions of said court." Probably this was unnecessary

¹⁶⁹ Thorpe VI, p. 3240.

¹⁷⁰ For the text of the provision see Appendix I.

in the light of modern practice, but it is worth while to make that practice certain on this point. If such opinions are to be given and are to be the basis of legislative or executive action in many cases of a difficult nature, it is by all means desirable that the public should have the means of knowing their content. It is important that succeeding legislatures and executives should know that certain measures are unacceptable and why, that certain policies of their predecessors were determined by constitutional considerations which will probably continue to influence the judicial department. It is important that the judges themselves and the legal profession should be able to ascertain how great constitutional jurists have dealt with problems, even though their consideration has been extra-judicial and is not binding upon the courts.

The first request¹⁷¹ under the clause came from the governor on November 27, 1865, and was answered very concisely without comment. The second¹⁷² was from the senate, on December 9, 1865, and, though in more general terms, did not differ essentially in nature from the previous request; both asked for opinions as to the power of the legislature to pass certain acts, and as to the construction of a constitutional clause. The judges refused to reply and proceeded to give a detailed interpretation of the advisory opinion provision. After declaring that the judges must determine what are "questions of constitutional law" and what are "solemn occasions," they construe the clause as if these two requirements must concur in order to bring the question within the section. A question must be "a question of law only, and it must arise upon the Constitution alone. It can scarcely be any other than some question of the proper construction and true meaning of some provision, clause, or words, contained in the Constitution; and it must be in its own nature, a judicial question, the final

¹⁷¹ Advisory Constitutional Opin. of the Judges, 37 Mo. 129.

¹⁷² Advisory Constitutional Opin. of the Judges, 37 Mo. 135.

determination of which, by the organic frame of our Government, properly belongs to the Judiciary. . . . Such questions should be important in reference to the public interest, and the necessary and immediate action of the Legislative or Executive branch of the Government, upon some matter of unusual magnitude and solemn concern for the public good." The judges' right to decide whether a request was within the section seems to have been exercised very whimsically, for the next three cases¹⁷³ scarcely stand the tests suggested above; yet answers were given. But in 51 Missouri, 586 (a case which is with difficulty distinguishable from that in 37 Missouri, 139) a reply was refused and the above principles reaffirmed.¹⁷⁴ Two opinions follow¹⁷⁵ in which the questions again fail to measure up to the standards set in 37 Missouri, 135, but proved acceptable. Then in 1874 the judges once more refuse to give their opinions, in the one case (with some reason) to the house of representatives,¹⁷⁶ in the other to the governor.¹⁷⁷ In the latter case still another criterion is suggested—questions must not relate to the constitutionality of an act already on the statute books. Such questions had already been answered in two cases.¹⁷⁸

The house of representatives was the source of two references to the judges, the senate three, and the governor five. Of these ten requests, four were denied an opinion. Under these

¹⁷³ Advisory Constitutional Opin. of the Judges, 37 Mo. 139. Opinion of Court in Response to Governor, 43 Mo. 351. Opinion of Court in Response to Governor, 49 Mo. 216.

¹⁷⁴ See criticism of H. A. Dubuque in Am. L. R. XXIV, pp. 389-90.

¹⁷⁵ Opin. of Supreme Court Judges on Township Organization Law, 55 Mo. 295 (this case is not reported in chronological order); Opin. of the Judges in Response to a Resolution of the Senate, 55 Mo. 215.

¹⁷⁶ Opin. of the Court in Response to the Resolution of the General Assembly, 55 Mo. 497.

¹⁷⁷ In the Matter of Inquiries Submitted by His Excellency, 58 Mo. 369.

¹⁷⁸ Advisory Constitutional Opin. of the Judges, 37 Mo. 139; Opin. of Supreme Court Judges on Township Organization Law, 55 Mo. 295.

circumstances,¹⁷⁹ it is no wonder that the clause was omitted from the constitution of 1875. It had been rendered ineffective by narrow judicial construction, and could be expected to be of little use while under the ban of judicial disapproval and the disadvantage of judicial misunderstanding. In 12 Colorado, 466, and again in 3 South Dakota, 548, the statement is made that Missouri "profited by her experience" and excluded the advisory opinion in 1875. This gives a false impression as to the character of the advisory opinion. It implies that the people of Missouri gave it a fair trial and found it undesirable. This is not true. It did not have a fair trial in Missouri, first because of the unfortunate interpolation of the word "constitutional," and secondly because the judges were not familiar with its history, did not appreciate its usefulness, and maintained an attitude of hostility throughout.

f. *Florida*. The next appearance of the advisory opinion was in territory equally remote from New England, and probably unaffected by the example of Missouri. It would be interesting to know how such a heterogeneous assemblage as the convention of 1868 happened to include so unusual a provision in their proposed constitution. Very probably the peculiar form of the clause¹⁸⁰ was due to special Reconstruction conditions. The governor alone is permitted to interrogate the justices. Possibly the idea was to promote cooperation between the executive and judiciary, and facilitate their union against a legislature that promised to be both incompetent and untrustworthy; possibly there existed an apprehension that if they attempted to succor that incompetence by permitting legislative consultation the popular organ of government might pervert the privilege, to oppress or gain control of the judiciary. The section is very broad in other respects, permitting questions "at any time . . . as to the interpretation of any portion of this constitution, or upon any point of law."

¹⁷⁹ Cf. Thayer, *Legal Essays*, p. 58.

¹⁸⁰ For the text of the provision see Appendix I.

As in Rhode Island, the opinion must be given in writing.

Very difficult questions were put to the justices from the start. On October 14, 1868,¹⁸¹ an opinion was requested as to the eligibility of former members of the Secession Convention to hold public office under the existing constitution. In November of the same year an extraordinary session of the legislature went through the form of impeaching the governor, and the latter promptly asked the justices if the proceedings were valid.¹⁸² Here, as was pointed out in the opinion, the justices practically had to decide who was acting governor of the State, for if the proceedings were valid, the interrogator was not entitled to an answer under the constitution.¹⁸³ The possibility of indirect judicial consultation by the legislature came to light in January, 1869, when the governor, at the request of the legislature, asked an opinion as to the legality of the recent election of a United States senator; the judges protested that this was not a matter of judicial cognizance, but felt bound under the constitution, to give the opinion required.¹⁸⁴ Nine more questions were referred to the judges during the next four years, one of them¹⁸⁵ again at the instigation of the legislature. Apparently it had become obvious that the form of the clause was too liberal, for it was materially changed by Amendment XI of 1875,¹⁸⁶ which limited requests by the governor to questions "as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties."¹⁸⁷ At once the tide was checked. There are two constitutional questions in 1875 and another in 1877; then there is a gap of ten years. No more questions originating

¹⁸¹ In the Matter of the Executive Communication, 12 Fla. 651.

¹⁸² In the Matter of the Executive Communication, 12 Fla. 653.

¹⁸³ See Baldwin, *Amer. Judiciary*, p. 49.

¹⁸⁴ In the Matter of the Executive Communication, 12 Fla. 686.

¹⁸⁵ In the Matter of the Executive Communication, 14 Fla. 320.

¹⁸⁶ For the text see Appendix I.

¹⁸⁷ This wording is continued in the constitution of 1885. See Appendix I.

with the legislature are found in the reports. With the resumption of interrogatories in 1887, the judges promptly availed themselves of the restrictions imposed in 1875, and since that time have refused to answer in nine different cases, on each occasion demurring that the question was not one involving the powers or duties of the executive under the constitution. The test established is reasonably clear, but the judges have not been consistent in applying it;¹⁸⁸ furthermore they have construed the provision with unnecessary strictness, thereby reducing the value of judicial aid to the executive to a minimum. Most of the questions to which a reply can be expected, as the clause is interpreted, could as well be answered by the attorney-general or some other legal adviser. It is practically impossible to get an opinion as to the constitutionality of a statute, but perhaps this is not undesirable, as long as it is not available to the legislature before a bill has become law.

Florida's contribution to the law or theory of the advisory opinion has been small, because of the limited scope of the clause, the close and unsympathetic construction placed upon it, the sameness of the questions submitted and the brevity of the replies. Perhaps the privilege has been a source of satisfaction to the governor occasionally, but it is hard to see why the legislature has not proposed an amendment which would extend the same favors to them. The people were evidently content with the scheme when they framed and adopted the new constitution of 1885; still it may be observed that the clause had not been used for eight years, and that refusals to answer were as yet unknown.

g. Colorado. There is strong evidence that the advisory opinion found its way into the constitutional system of the Centennial State, not as an experiment but as a remedy for existing ills. It does not appear in the constitution of 1876,

¹⁸⁸ Cf. *In re Executive Communication Concerning Powers of Legislature*, 23 Fla. 297, and *In re Advisory Opinion*, 43 Fla. 305.

but was adopted as an amendment ten years later.¹⁸⁹ In 1889, Chief Justice Helm sketched the historical setting in the following words: "The successive legislatures meeting after the admission of Colorado to statehood encountered great difficulty in the enactment of laws on account of numerous wise but troublesome limitations contained in the constitution. Perplexity and confusion arose in consequence of legislation which this court was ultimately compelled to hold invalid. It was deemed expedient that each house should have the privilege of submitting questions, so that the injurious consequences arising from unconstitutional legislation might be avoided by having the validity of proposed legislative acts thus determined in advance."¹⁹⁰ A similar picture is revealed in the advice of Governor Eaton to the first legislature assembling after the adoption of the amendment: "I cannot forbear to direct your attention once more to the damage that has been done the State by the enactment of laws that have proved to be unconstitutional. It is a serious matter, for it breaks down public confidence in the wisdom of the Legislature. It is an error easily avoided. The Constitution had this source of danger in view when it provided that on grave occasions the Supreme Court shall give its opinion to the General Assembly on the legality of any legislation contemplated. The long list of laws that conflict with the Constitution are a significant comment of this question. It seems to me that any occasion where there is the least doubt, is grave enough to warrant your honorable body in seeking the advice of the court. It would save the people great expense and confusion if you would habitually do so."¹⁹¹ And corroborating this explanation is the fact that the first fifteen references (except two on the procedure of legislative enactment) were questions as to the constitutionality of pending or possible bills. This contempor-

¹⁸⁹ For the text of the provision see Appendix I.

¹⁹⁰ In the Matter of the Constitutionality of SB. No. 65, 12 Colo. 466.

¹⁹¹ Message of Jan. 7, 1887. SJ. 1887, 126.

aneous construction of the legislature is an important indication of the purpose and meaning of the amendment.¹⁹² Mr. O. F. A. Greene,¹⁹³ a member of the legislature that proposed the amendment, testified to the same effect: "The legislative mind had neither a negative nor an affirmative purpose in regard to the value of such opinions as general judicial precedents. So far as evidence goes, both from word and act, the Legislature was confined solely to the purpose of avoiding breakers as to its own acts."¹⁹⁴ True, in a later passage of the same letter¹⁹⁵ he minimizes preceding legislative troubles, but the purpose of the legislators in proposing the amendment is the point in which we are interested, and not the accuracy of Chief Justice Helm's representations as to the extent of judicial repeal from 1876 to 1886.

The advisory opinion clause was one of several changes in the judicial article of the constitution proposed in SB. No. 87, which was introduced by Senator James M. Freeman, on January 20, 1885.¹⁹⁶ The bill was referred to the committee

¹⁹² In the Matter of the Constitutionality of SB. No. 65, 12 Colo. 466, at p. 471.

¹⁹³ Mr. Greene began the practice of law in 1871, was elected representative to the Colorado legislature in 1881 and 1883, and a senator in 1885. He was chairman of the judiciary committees of both house and senate in turn, and was a member of that committee in the senate when the proposed amendment was referred to it. He was the author of a Digest of Supreme Court Decisions (Colo.) and occupied the chair of Roman Law in the State University.

¹⁹⁴ From a letter to *The Nation* on Jan. 2, 1890, Vol. 50, p. 50.

¹⁹⁵ "I think no instance can be found in which a competent legislator has been seriously troubled (by constitutional limitations). The difficulty in the way of needed legislation has been the incorrigibility of the personnel of the Legislatures. Instances of enactments pronounced void or inoperative on constitutional grounds are not so numerous as might be inferred from the words of the Judge; and the cause of any such is usually traceable to the stupidity of its framers." *Ibid.*

¹⁹⁶ SJ. 1885, 176.

on the judiciary¹⁹⁷ which redrafted and reported it, on February 23, without the advisory opinion clause. But this was restored in committee of the whole (March 4th).¹⁹⁸ The bill was passed upon March 9th, all the members of the judiciary committee voting for it, except Senator Chilcott. Amendments from the house compelled it to run the gauntlet of a conference committee, and final passage only took place on April 6th.¹⁹⁹ The governor promptly approved on April 7th.²⁰⁰ In considering the little opposition the measure met in the legislature and the apparent approval of the legal lights therein, it must be remembered that the bill contained six other proposed amendments, some of considerable importance.²⁰¹ But the act also provided that voters could designate by number those changes which they wished to approve. The advisory opinion amendment was adopted on November 2, 1886, by a vote of 16,858 to 9,453.²⁰²

The wording of the clause calls for very careful consideration.²⁰³ First of all it is the "Supreme Court" and not the justices that is to give the opinion. The change may have been fortuitous and without any special meaning²⁰⁴ but it did not pass unnoticed. In the opinion already referred to,²⁰⁵ Helm, C. J., makes this difference in wording together with the required publicity of opinions, the basis of his conclusion that the opinions "have all the force and effect of judicial pre-

¹⁹⁷ A. M. Stevenson, O. F. A. Greene, J. M. Freeman, Mason B. Carpenter, George M. Chilcott, Frank Tilford, A. J. Rising, C. C. Parsons, and B. H. Butcher.

¹⁹⁸ Greene says by "a hasty amendment." *The Nation*, *ubi supra*.

¹⁹⁹ SJ. 1885, 1738.

²⁰⁰ Sess. L. 1885, 145-7.

²⁰¹ The disappearance of the advisory opinion in the judiciary committee and Greene's criticism in *The Nation*, already referred to, indicate the usual disapproval of the profession.

²⁰² Sess. L., 1887, 483; and Mill's Annot. Stat. Colo. I, 258.

²⁰³ For the text of the provision see Appendix I.

²⁰⁴ O. F. A. Greene in *The Nation*, *ubi supra*.

²⁰⁵ In the Matter of the Constitutionality of SB. No. 65, 12 Colo. 466.

cedents." The correctness of his position will be examined later, but to say the least the phrase in question was carelessly employed if the intention was to establish a purely extrajudicial practice. Hayt, C. J., reiterated the same argument in a later case,²⁰⁶ though guardedly. The court ultimately escaped from the inconvenient results of this proposition,²⁰⁷ but to this day the court acts as a whole upon questions submitted and opinions are generally rendered "*Per Curiam*." The second notable change is that the importance of the questions and the solemnity of the occasion are made concurrent conditions; both requirements must be satisfied before the court is required to answer. As already remarked, perhaps in common sense this qualification is unnecessarily verbose, for the solemnity of an occasion ought to make a question important, as a question of sufficient importance might well give solemnity to the occasion of its consideration. Still if the judges in Colorado had been disposed to construe the clause as strictly as it has been done elsewhere, the concurrence of these requirements would have given them an excellent means of limiting its operation. Finally, as in Missouri, the opinions are to be "published in connection with the reported decisions of said court." As far as can be ascertained, this has been done faithfully and with reasonable promptness, though the group of opinions given in each session of the legislature is not chronologically arranged within itself, for the first few sessions.²⁰⁸

The privilege of judicial consultation has been more widely used in Colorado than in any other State. Ninety-three opinions in all have been recorded in a period of thirty years. The governor has made twenty-four requests, the senate thirty-six, the house thirty-two, and the senate and house jointly, one.

²⁰⁶ In re Priority of Legislative Appropriations, 19 Colo. 58.

²⁰⁷ In re Fire and Excise Commissioners, 19 Colo. 482; and see p. 229 *infra*.

²⁰⁸ The inconvenient failure to date decisions in the Colorado reports makes it difficult to check up a matter like this.

Of the sixty-nine for which the inquiring spirit of the law-makers is responsible, seventeen were given to the legislature of 1887, thirteen to that of 1889, six to that of 1891, and nine to that of 1893. Recent legislatures have limited themselves to from one to three requests each. Possibly this is due to improvement in the personnel of the lawmaking body; certainly if there is not greater ability there, there is at least greater self-confidence. It would be very interesting to know whether the decrease in the number of advisory opinions asked has been preceded or accompanied by a decrease in the number of laws rejected by the supreme court as unconstitutional. Refusals to answer have been unusually numerous also, reaching a total of twenty-four. Sixteen of these, beginning with the very first one,²⁰⁹ rested, in whole or in part, upon the proposition that such constitutional provisions could not be considered as authorizing an *ex parte* adjudication of private rights. This was a perfectly simple proposition, which had already been recognized in other States, and which was quite in accord with the best authority in the English antetype. However, the Colorado justices have given it a somewhat forced application, and the frequent recurrence of this same objection must be charged partly to judicial severity, partly to legislative stupidity.

I think it must be said that the scheme, on the whole, has worked well in Colorado. As will appear in a subsequent chapter,²¹⁰ the advice of the court is usually followed, and its opinions have been a very valuable aid both to the executive and the legislative departments. The judicial department has suffered no loss of independence or prestige, and the judicial functions have not been seriously impaired. I am not aware that any movement has been made to do away with the device and it is to be hoped that failure would attend any such attempt.

²⁰⁹ In the Matter of Senate Resolution on the Subject of Irrigation, 9 Colo. 620.

²¹⁰ See pp. 154-158 *infra*.

h. *South Dakota*. In this most recent adherent to the advisory opinion, as in the New England States, the clause formed part of the original constitution.²¹¹ For some reason (perhaps because of the notorious flood of legislative interrogations in Colorado in 1887 and 1889) the privilege of judicial consultation is limited to the governor, but there is a decided improvement in wording upon the Florida clause. Opinions may be required "upon important questions of law involved in the exercise of his executive powers and upon solemn occasions." The omission of the word "constitutional" (responsible for six of the nine refusals in Florida) is most commendable. Also the adjunction of the phrase "and upon solemn occasions" as an independent class of cases should make the clause much more flexible and useful; no test case has arisen, but the judges have indicated *obiter* that they would construe this dependently.²¹² However, the opinion given in 1914²¹³ is *contra*.

The device has been used very sparingly—twelve times altogether, and only once since 1900. The judges may be responsible for this, for their replies have not been cordial and they have been disposed to give the section "a restricted rather than an enlarged interpretation."²¹⁴ The proportion of refusals is large—four out of twelve requests—but they have not been unreasonable; more would have been quite justifiable.²¹⁵ Apparently the court has construed the veto power of the governor as an executive power,²¹⁶ which really permits the testing of a bill's constitutionality before it is enacted into law.²¹⁷ In fact the court has indicated a willingness to answer purely legisla-

²¹¹ For the text of the provision see Appendix I.

²¹² In re House Resolution No. 30, 10 S. D. 249.

²¹³ In re Opin. of Judges, 34 S. D. 650.

²¹⁴ In re Chap. 6, Session Laws of 1890, 8 S. D. 274.

²¹⁵ For example In re Limitation of Taxation, 3 S. D. 456, and In re State Census, 6 S. D. 540.

²¹⁶ Cf. In re Executive Communication, 23 Fla. 297.

²¹⁷ In re Limitation of Taxation, 3 S. D. 456, and perhaps In re State Warrants, 6 S. D. 518. Cf. the scheme in Panama and Colombia, p. 94 *infra*.

tive questions as long as private property rights were not involved.²¹⁸ But little use has been made of these opportunities.

2. *When Not Authorized by the Constitution*

It is not the purpose of this section to examine those cases where requests have come from sources other than those empowered to interrogate the supreme court when an advisory opinion clause existed in the constitution.²¹⁹ But in many of the States, there have been occasions when the need of judicial advice was so keenly felt, that attempts have been made to secure such assistance without any constitutional authorization whatever. Indeed some legislatures have tried to impose upon the judges an obligation to answer by law. Sometimes judicial opinions are not required in so many words, but extra-judicial duties are imposed which in effect involve the elicitation of such opinions, purely by way of advice. These different kinds of extra-constitutional judicial consultation will be reviewed here briefly.

a. *Federal Government of the United States.* The advantages of judicial assistance in legislative matters was clearly seen by several of the leaders in the constitutional convention of 1787. Madison, Ellsworth, James Wilson and Gouverneur Morris urgently advocated that the judiciary be joined with the executive as a revisory council to pass upon legislative acts of the other department. Several reasons were advanced for such a scheme. It was feared that a popularly elected legislature would be too strong and would become master of the other departments of government. The executive would need the reinforcement of the judiciary²²⁰ and the judiciary must have some such means of defending itself against legislative encroachments.²²¹ Then, too, the character of legislation

²¹⁸ *In re State Census*, 6 S. D. 540.

²¹⁹ See pp. 152-4 *infra*.

²²⁰ Wilson, in 5 Ell. Deb. p. 121.

²²¹ Madison, *ibid.*, p. 178-80.]

would be improved. "The aid of the Judges will give more wisdom and firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive cannot be expected always to possess."²²² "It would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity and technical propriety in the laws. . . . It would . . . be useful to the community at large as an additional check on those unwise and unjust measures which constituted so great a portion of our calamities."²²³ It would hinder the passage of pernicious laws and discourage demagogues from attempting to get them passed; if the judges were compelled to wait till the laws came before them in judicial proceedings, they could only negative laws which were unconstitutional; in a revisory council they could negative any unjust or harmful law.²²⁴ The chief arguments in opposition were two. First, it was pointed out that this council would violate the principle of the separation of powers.²²⁵ This evoked the reply that the separation of powers argument really had no weight in this case, or if it did it applied as well to executive revision and veto as to judicial; and Gouverneur Morris added that the device would really make more certain the separation of powers, for the legislature was so strong that the other departments would have to be combined to resist encroachments on their field.²²⁶ Then it was claimed that the judges ought not to be biassed in their exposition of the laws by having participated in the making of them.²²⁷ But Madison objected that "a small proportion of the laws coming in question before a Judge would be such wherein he had been consulted."²²⁸ Although this revisory

²²² Ellsworth, *ibid.*, p. 399.

²²³ Madison, *ibid.*, p. 401.

²²⁴ Mason, *ibid.*, p. 403.

²²⁵ *Ibid.*, pp. 122 and 401.

²²⁶ *Ibid.*, p. 404.

²²⁷ *Ibid.*, p. 122; and see Gerry, *ibid.*, p. 401.

²²⁸ *Ibid.*, p. 122.

council was urged on five different occasions,²²⁹ the convention would not give its approval. Charles Pinckney then proposed²³⁰ a clause which (*mutatis mutandis*) was identical with that already existing in Massachusetts, except that opinions were to be required from the court instead of the justices.²³¹ This was referred without debate to the Committee of Detail, and saw the light of day no more.

It has been intimated by Professor Beard²³² that the failure of the revisory council was due to a feeling in the convention that the supreme court would sufficiently control legislation through judicial revision; but there is very little evidence of the sentiment of the convention on the relations between executive and judiciary. In general, they were to be independent, that is clear; but how much cooperation did this principle permit? President Washington, who had presided at the convention, evidently thought it should be liberal in extent. In 1790 he wrote to the justices, expressing his persuasion that the judiciary should be independent in its operations, but intimating his willingness to receive suggestions from them on the organization of the judicial system.²³³ In 1793, the difficult questions involved in our relations with France prompted him to go much farther. Probably it was in a cabinet meeting of July 12th that "it was determined to request the answers of the judges of the supreme court of the United States to a series of questions comprehending all the subjects of difference which existed between the executive and the minister of France relative to the exposition of the treaties between the two coun-

²²⁹ May 29, Madison's Journal, I, p. 62; June 4, *ibid.*, I, pp. 101 and 107; June 6, *ibid.*, I, pp. 121-124; July 21, *ibid.*, II, pp. 398-405; and August 15, *ibid.*, II, p. 533.

²³⁰ Mad. Jour. II, p. 558; 5 Ell. Deb. p. 445.

²³¹ Cf. the form of the clause in Colorado.

²³² The Supreme Court and the Constitution, p. 63.

²³³ Spark's Washington, X, p. 86.

tries.”²³⁴ In a letter from Jefferson, Secretary of State, to the justices, dated July 18th, the latter are informed that the war has been responsible for many difficult questions of a legal nature which were causing the executive department much difficulty, but were usually presented in such a way that they could not be brought before the courts in judicial proceedings. “The President would, therefore, be much relieved, if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties. He has therefore asked the attendance of such judges as could be collected in time for the occasion, to know, in the first place, their opinion, whether the public may with propriety be availed of their advice on these questions? And if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on.”²³⁵ Probably a day or two later twenty-nine questions were submitted to the justices, dealing almost entirely with our rights and obligations as a neutral state.²³⁶ The judges evidently hesitated to reply, for in a letter of July 23rd²³⁷ the president assents to a delay until the opinions of absent justices can be ascertained. Marshall says²³⁸ it was about July 25th that the judges communicated²³⁹ to the president their unwillingness to state their opinions on the question submitted. “Considering themselves merely as constituting a legal tribunal

²³⁴ Marshall's *Life of Washington*, V, p. 433.

²³⁵ Jefferson's *Works*, IV, p. 22.

²³⁶ For the text of these questions see Spark's *Washington*, X, App. XVIII.

²³⁷ Spark's *Washington*, X, p. 359.

²³⁸ *Life of Washington*, V, p. 441.

²³⁹ Unfortunately the exact text of this communication is not available.

for the decision of controversies brought before them in legal form, those gentlemen deemed it improper to enter the field of politics, by declaring their opinions on questions not growing out of the case before them."²⁴⁰ Early in August the president and cabinet acted independently of the judiciary, and, using their own judgment²⁴¹ as to the points of law involved, proclaimed the eight rules so well known in the early history of international law in the United States.²⁴² There appears to be no other instance in our history where the executive has sought the extra-judicial advice of the supreme court justices, and the rule of this case has been accepted as a principle of our constitutional law. "The judicial department . . . can be called upon only to decide controversies brought before them in a legal form; and therefore are bound to abstain from any extra-judicial opinions upon points of law, even though solemnly requested by the executive."²⁴³

It remains to consider the relations of the legislative department and the judiciary. Several times the former has endeavored to impose duties on the courts which were not judicial in character. On March 23, 1702, Congress passed an act dealing with widows' and orphans' claims and invalid pensions.²⁴⁴ United States circuit courts were required to receive applications for relief under the act and decide the merits thereof, but such decisions might be reconsidered or suspended by the secretary of war, or revised by Congress. The different circuit courts

²⁴⁰ Marshall's *Life of Washington*, V, p. 441. In connection with this 1793 case, the comment of Thayer (*Legal Essays*, pp. 42-60) is worth quoting: "It was, perhaps, fortunate for the judges and their successors that the questions then proposed came in so formidable a shape as they did. . . . Had they been brief and easily answered the Court might, not improbably, have slipped into the adoption of a precedent that would have engrafted the English usage upon our national system."

²⁴¹ See letter of August 4th in Spark's *Washington*, X, App. xviii.

²⁴² For text see Spark's *Washington*, X, App. xix.

²⁴³ Story on the Constitution, II, s. 1571.

²⁴⁴ 1 U. S. Stat. at L., 243.

promptly sent letters to the president (on April 5th, April 18th and June 8th) stating that they would not act in such cases and setting forth their reasons for refusing.²⁴⁵ All of them referred to the separation of powers as a fundamental principle of our constitution, and denied the right of either executive or legislature to impose any but judicial duties upon the courts, to be exercised as prescribed in the constitution, the provisions of which did not empower Congress or any executive officer "to sit as a court of errors on the judicial acts or opinions of this court." Some of them doubtfully indicated that they might act as individual commissioners appointed by official titles, to avoid giving distress to many meritorious individuals by a delay.²⁴⁶ The matter was brought before the supreme court by an application of the attorney-general for a writ of *mandamus* to a circuit court in a particular case.²⁴⁷ Meanwhile the president had communicated the remonstrances from the various courts to Congress,²⁴⁸ and while Hayburn's Case was still under advisement, Congress provided another way for the relief of pensioners;²⁴⁹ so the opinion of the supreme court remains undisclosed, but Taney, C. J., said, many years later, that "the repeal of the Act clearly shows that the President and Congress acquiesced in the correctness of the decision (sc., the opinions of the circuit courts) that it was not a judicial power."²⁵⁰ An unreported case came to light at the same time (1851), in which the supreme court permitted the United States to recover money paid as a pension under an award of Jay, C. J., and Cushing, J., sitting *as commissioners* under the Act of 1792.²⁵¹ Taney, C. J., said this meant that the supreme

²⁴⁵ See text in Hayburn's Case, 2 Dall. 409.

²⁴⁶ See especially the opinion of the court for the N. C. district—*l.c.*

²⁴⁷ Hayburn's Case, 2 Dall. 409.

²⁴⁸ On April 16th, April 21st and November 7th; see Annals of Cong. III, 557, 572 and 671.

²⁴⁹ 1 U. S. Stat. at L., 324.

²⁵⁰ In U. S. v. Ferreira, 13 How. 40, at p. 50.

²⁵¹ U. S. v. Yale Todd, reported in note to U. S. v. Ferreira, *ubi supra*.

court as a whole, after argument, was convinced that when an Act intended to confer power on courts as a judicial power, it would not be construed as the nomination of the judges of those courts to act as commissioners in the exercise of that power. In *U. S. v. Ferreira*,²⁵² Congress had passed an act²⁵³ directing the district judge for the Northern District of Florida to receive and adjudicate certain claims of Spanish inhabitants for losses suffered during the operations of the American army in Florida, and to report the decisions and evidence to the secretary of the treasury, who should pay the same, if he were satisfied that they were just and equitable. The district judge had decided a claim in favor of Ferreira, and the district attorney appealed to the supreme court. Here the case was dismissed for want of jurisdiction, Taney, C. J., saying it was clear that the judge acted as a specially constituted commissioner whose award was subject only to the approval of the secretary of the treasury; this was not a judicial proceeding, and no appeal would lie to the supreme court. He cited *Hayburn's Case* as an authority, but *U. S. v. Yale Todd* was not called to his attention till afterwards.

Since the days of Washington, then, it has been a settled rule that the supreme court of the United States will not exercise extra-judicial functions, at the behest either of the executive or of Congress, and cannot be compelled to do so by any means short of a constitutional amendment.²⁵⁴ The judicial power extends only to *cases* arising under the constitution, laws and treaties of the United States,²⁵⁵ and a case arises only when a matter is submitted to the court "by a party who asserts his rights in the

²⁵² 13 How. 40.

²⁵³ 9 U. S. Stat. at L., 788.

²⁵⁴ Cf. the words of Taney, C. J., in *Gordon v. U. S.*, 117 U. S. 697, at p. 700: "Its jurisdiction and powers and duties being defined in the organic law of the government, and being all strictly judicial, Congress cannot require or authorize the court to exercise any other jurisdiction or power, or perform any other duty."

²⁵⁵ Const. Art. III, s. 2.

form prescribed by law."²⁵⁶ Also the jurisdiction extends only to cases where the court can render judgment in the legal sense of the term.²⁵⁷ This means that the judgment must be "conclusive upon the rights of the parties, and process of execution awarded to carry it into effect. The award of execution is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. . . . It would be merely an opinion, which would remain a dead letter and without any operation upon the rights of the parties, unless Congress should at some future time sanction it."²⁵⁸ More recently (in 1891) the supreme court has even frowned upon a "friendly suit" brought to test the constitutionality of a law unsuccessfully opposed in the legislature.²⁵⁹

The court of claims is a curious anomaly. Created in 1855 with jurisdiction of all claims (with two exceptions) in respect of which "the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty,

²⁵⁶ Marshall, C. J., in *Osborn v. Bank of U. S.*, 9 Wheat. 319.

²⁵⁷ Taney, C. J., in *Gordon v. U. S.*, *ubi supra.*, at p. 704.

²⁵⁸ *Ibid.*, at p. 702.

²⁵⁹ *Chicago, etc. R. R. Co. v. Wellman*, 143 U. S. 339. See especially Brewer, J.,'s words at p. 344: "The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversies between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

if the United States were suable," it does not seem to have been a full-fledged court exercising judicial powers until 1866. "Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress."²⁶⁰ An amending act of 1863²⁶¹ purported to authorize the rendering of final judgments, but section fourteen provided "that no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefore shall have been estimated for by the Secretary of the Treasury." Because this necessarily implied revision of the decisions by the head of an executive department, the supreme court held that judicial power was denied the court of claims, and refused to entertain an appeal from its decisions.²⁶² In the opinion of Taney, C. J., the action of the court of claims was like that of an auditor or comptroller. "In principle, there is no difference between these two special jurisdictions . . . and neither of them possesses judicial power in the sense in which those words are used in the Constitution. The circumstance that one is called a court and its decisions called judgments cannot alter its character or enlarge its power."²⁶³ The defect was remedied by the repeal of the offending section in 1866,²⁶⁴ and the supreme court thenceforth allowed appeals from the court of claims as regulated by statute.²⁶⁵ Strictly speaking, there is perhaps, an exception here to Chief Justice Taney's assertion that process of execution is a necessary concomitant of judicial power; but practically the exception is only apparent, for the

²⁶⁰ U. S. v. Klein, 13 Wall. 144.

²⁶¹ Chap. 92, 12 Stat. L. 765.

²⁶² Gordon v. U. S., 2 Wall 561. See statement of court record in U. S. v. Jones, 119 U. S. 477.

²⁶³ From an opinion written for Gordon v. U. S. and printed as an appendix in 117 U. S. 697.

²⁶⁴ Chap. 19, 14 Stat. L. 9.

²⁶⁵ U. S. v. Jones, 119 U. S. 477, and cases cited therein.

statute really attaches an automatic execution to every final judgment of the court of claims.²⁶⁶

However, the court of claims still exercises extra-judicial functions. Under the Bowman Act of 1883, the senate or house of representatives or any of their committees may refer pending claims or matters to the court of claims for the determination of facts, and any executive department may refer pending claims or matters involving questions of law or fact; in either case, the court is not to enter judgment, but must report its findings of fact or opinions of law to the referring body or individual. "The function of the Court of Claims, in such a case, (is) ancillary and advisory only," and no appeal therefrom will be entertained by the supreme court.²⁶⁷

b. *Pennsylvania*. According to Thayer²⁶⁸ opinions were given by the Pennsylvania judges to the executive department on several occasions between 1780 and 1790. *Respublica v. De Longchamps*²⁶⁹ is an instance of such an opinion. The defendant had been found guilty of violence done to the consul-general of France but "sentence of the court was suspended, in consequence of a case stated by his Excellency the President, and the Honorable Supreme Executive Council, for the opinion of the Judges. It was argued in open court, on the 10th and 12th of July, by five Counsel, two for the affirmative and three for the negative." The president and council had asked whether the defendant could be legally delivered up to be tried in France, as demanded by the French minister, and if

²⁶⁶ "In all cases of final judgments by said court, or, on appeal, by the said supreme court, where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of said court of claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court." Section 7 of Chap. 92, 12 Stat. L. 765.

²⁶⁷ In re Sanborn, 148 U. S. 222.

²⁶⁸ Cases on Constitutional Law, I, p. 183 n.

²⁶⁹ 1 Dall. 111 (1784).

not, whether imprisonment under this conviction could continue till the king of France was satisfied. The judges returned a negative answer to both questions and then pronounced sentence.

The legislative department also sought judicial assistance in 1807,²⁷⁰ enacting "That the judges of the Supreme Court are hereby required to examine and report to the next legislature, which of the English statutes are in force in this Commonwealth, and which of those statutes in their opinion ought to be incorporated into the statutory laws of this Commonwealth." The judges responded cordially, indicating that they were honored by the request and more than willing to comply with it. After making a careful examination of the English statute law as well as the constitutional and statute law in Pennsylvania, they submitted a schedule of English statutes then in force in Pennsylvania, with recommendations as to their inclusion in or omission from a codification.

c. *New York*. There is clear evidence that in New York too, the judges gave extra-judicial assistance to the other two departments of government though not required to do so by the constitution. However, they seem to have considered legislative authorization a prerequisite. In March, 1801, Governor Jay asked the judges of the supreme court and the chancellor whether members of the council of appointment could make nominations, or could only confirm or reject the governor's nominations. They "refused to decide the question as extra-judicial."²⁷¹ With statutory assistance, the executive has fared better in a particular class of cases. A law of 1829²⁷² provided that, following conviction in capital cases, the presiding judge should communicate to the governor notice of the sentence and his own notes of the testimony; and the gov-

²⁷⁰ 3 Binney, 595.

²⁷¹ See Pellew's John Jay, p. 334; also Roberts' New York, II, p. 489.

²⁷² 2 Rev. St. 658, Pt. IV, tit. 1, ss. 13, 14.

error might "require the opinion of the Chancellor, the Justices of the Supreme Court, and of the Attorney-General, or of any of them, upon any statement so furnished."²⁷³ In *People v. Green*²⁷⁴ such an opinion was required as to whether certain evidence had been properly admitted.²⁷⁵ Counsel appeared for both the People and the defendant. The Chancellor, C. J., and Beardsley, J., advised the governor that the trial court had committed no error, and the defendant was executed.

At least one of these judges²⁷⁶ joined in an opinion to the legislature the following year.²⁷⁷ In the absence of constitutional authority, the legislature passed an act (1845) recommending a constitutional convention and referred it to the people. The act provided that the delegates to the convention should be the same in number as the members of the Assembly. The people approved it in 1845. The apportionment of representatives had been fixed by the constitution till January 1, 1847, but in 1846 the legislature passed a new apportionment act, and a bill was introduced to base the number of convention delegates on the new apportionment. This bill was referred to the justices by the house, with the request for an opinion as to whether the legislature had power to change the act of 1845. The judges expressed their regret that "questions of so much delicacy and importance should be presented under circumstances which have given us but a few hours for confer-

²⁷³ Thayer, *Cases on Constitutional Law*, I, p. 183 n., says that by a statute of 1847, the judges of the court of appeals were substituted for the Chancellor, and that the law still exists in that form. *N. Y. Code Crim. Proc.*, ss. 493, 494.

²⁷⁴ 1 Denio 614.

²⁷⁵ The report says the governor "consulted his legal advisers in such cases."

²⁷⁶ Beardsley, J.

²⁷⁷ See *Deb. Mass. Conv. 1853*, I, pp. 138-40; it may also be found in Jameson (*Constitutional Conventions*, pp. 386-414 and 663), who says it was probably omitted from the regular reports because authorized by no constitutional provision.

ring together and reducing our opinion to writing;" but answered that the act of 1845 must stand as approved by the people and that the apportionment referred to therein is the old apportionment.²⁷⁸ Notwithstanding, the legislature passed the bill and the people accepted it and elected delegates on the basis of the new apportionment.

It seems doubtful that this precedent would be followed now. In a submitted controversy on an agreed case,²⁷⁹ the fifth prayer involved the question whether a city could do certain things not then permitted in its charter, if the legislature amended the charter. Williams, J., (with the concurrence of the other justices) replied: "We are by this submission gravely asked to say whether such an amendment, if made by the Legislature, would be constitutional. . . . It is time enough to pass upon the constitutionality of an act of the Legislature after it has become a law. Courts do not instruct the Legislature in advance as to what powers they have under the Constitution to pass laws." But of late years several attempts have been made to establish the advisory opinion in the constitutional system of New York. In 1907 and 1908, an amendment was proposed in the Assembly permitting either house or the governor to require the opinion of the court of appeals on important questions of law.²⁸⁰ In 1912 and 1913 the same amendment with the addition of the phrase "and upon solemn occasions," was proposed.²⁸¹ Also in 1913, an amendment was proposed²⁸² giving each house authority to require opinions upon "important bills pending in

²⁷⁸ Jameson (*l.c.*) says this opinion is wrong.

²⁷⁹ *Cataract Power Co. v. Buffalo* (1909) 115 N. Y. Supp. 1045.

²⁸⁰ 1907 Assem. No. 2239 (Int. 1648), Assem. J. 1896, and 1908 Assem. No. 773 (Int. 675), Assem. J. 293.

²⁸¹ 1912 Assem. No. 1051 (Int. 956), Assem. J. 459, 940, 1045, 1148; and 1913 Assem. No. 682 (Int. 656), Assem. J. 224, 1055, 1119, 1158, 1271, 1663.

²⁸² 1913 Assem. No. 180 (Int. 177), Assem. J. 64, 1054, 1116, 1158, 1270, 1564, 1947, 2010.

the legislature, before their third reading, as to their constitutionality, excepting, however, private or local bills." In none of these cases did the bill reach the stage of presentment to the people.²⁸³ Finally, in 1915, both of the above propositions were introduced in the constitutional convention of that year,²⁸⁴ but neither was reported out by the judiciary committee.

d. *North Carolina.* In North Carolina, too, opinions have been given to both departments, though with express reservations as to cases wherein private property rights were involved. The senate, in 1849,²⁸⁵ asked the opinion of the court on certain constitutional questions which arose in a contested election. As the questions were of a judicial character and since there was no doubt in their minds as to the rules of law requested, the justices "deemed it a duty of courtesy and respect to the Senate, to consider the points submitted to them and to give their opinions thereon." But they stated clearly that the reply was "not strictly an act of official obligation," and that if they had been in doubt as to the law, "they would have been obliged to defer their answer until the parties or their counsel could submit their views." Again, in 1869,²⁸⁶ an opinion was requested by the General Assembly, dealing with the term of office of its members. Pearson, C. J., and Dick, J., were sure the judges were not forbidden by the constitution to answer in such cases and "the question is more easy of solution now, when it can be treated as a dry matter of constitutional law, than it might be hereafter, when complicated with collateral considerations." They distinguished the refusal to reply in the Homestead Act case,²⁸⁷ as that involved property rights that might come before the court. But Reade,

²⁸³ N. Y. State Constitution Annotated, Pt. II, pp. 69, 137, 138.

²⁸⁴ The first by Mr. Donnelly on April 27th, the second by Mr. Parsons on June 10th. See Proposed Amendments, etc. No. 9 and No. 559.

²⁸⁵ 31 N. C. (9 Ire.) App.

²⁸⁶ Opinions of the Justices of the Supreme Court, 64 N. C. 785.

²⁸⁷ This must have been c. 1868-9; I have not been able to find it.

Rodman and Settle, JJ., refused to give any opinion on the question stated, relying on the separation of powers principle as impliedly forbidding such extra-judicial advice—Rodman, J., adds “except on occasions of the most manifest necessity.” This rebuff apparently discouraged the legislature from further interrogations—and the governor as well, though he had received advice, given without question, in an extradition case of 1866.²⁸⁸

e. *Delaware*. The legislature of Delaware, in 1852, gave the governor a statutory power to request opinions from the chancellor and judges on questions of constitutional or statutory law, necessarily involved in the proper discharge of his duty.²⁸⁹ This provision was still law in 1915,²⁹⁰ but the governor does not seem to have made any attempt to avail himself of it. Thayer²⁹¹ mentions a request from the legislature to the governor (1895) that he submit to the judges a question relating to the apportionment of delegates to a constitutional convention, but he found no record of executive action.

f. *Illinois*. No advisory opinion is recorded in the Illinois reports, to the knowledge of the writer, but a dictum of 1857 may be mentioned in passing. The relator had asked for a writ of *mandamus* to compel the governor to issue certain bonds. This the court refused to grant, disclaiming any power to compel the other departments of government to act; but added that though the governor was independent of the court, “should he consent to appear, asking our opinion on a

²⁸⁸ In the matter of Hughes, 61 N. C. 57.

²⁸⁹ “The chancellor and judges, whenever the Governor shall require it for public information, or to enable him to discharge the duties of his office with fidelity, shall give him their opinions in writing, touching the proper construction of any provision in the constitution of this State or of the United States, or the constitutionality of any law enacted by the legislature of this State.” Ch. 27, s. 4, of the Rev. Sts. of 1852 as Amended (1893), p. 245.

²⁹⁰ Rev. Code 1915, c. 13, s. 2. Par. 402 on p. 220.

²⁹¹ Legal Essays, p. 55 n.

point of law, it would be readily given."²⁹² It is quite possible that the court only had in mind such cases as that in 17 Illinois, 167, when the governor appeared voluntarily on an agreed case upon an application for a *mandamus* to compel him to issue certain commissions, and would have refused any advice to him in cases not regularly brought before them.

g. *Minnesota*. The legislators of Minnesota were not so altruistic as those of Delaware, for when they attempted to impose upon the supreme court the statutory duty of acting as a source of general information, they bestowed the right of interrogation, not upon the governor but upon either house of the legislature.²⁹³ Twice the judges refused (without explanation) to recognize any obligation to reply to questions put under the statute.²⁹⁴ But the senate at least chose to look upon this as an oversight, and in 1865 again asked their opinions upon certain questions. The judges now came out with a definite statement of their position with respect to the statute, and their refusal was put on record in the reports.²⁹⁵ McMillan, J., declares that the statute is unconstitutional, for the fundamental principle of the separation of powers "prohibits the imposition by one (department) of any duty upon either of the others not within the scope of its jurisdiction. . . . The duty sought to be imposed by the section of the act referred to, is, clearly, neither a judicial act, nor is it to be performed in a judicial manner. It constitutes the supreme court the advisers of the legislature; nothing more." Moreover "we are prevented from voluntarily complying with the request, by the views we entertain of our judicial duty and the injurious

²⁹² *People ex rel. v. Bissell*, 19 Ill. 229.

²⁹³ Comp. Stat. s. 15, ch. 4, provided that "either house may, by resolution, request the opinion of the supreme court, or any one or more of the judges thereof, upon a given subject, and it shall be the duty of such court or judges, when so requested, respectively, to give such opinion in writing."

²⁹⁴ SJ. 1858, 718; SJ. 1863, 54, and Laws 1863, 75.

²⁹⁵ In the matter of the Application of the Senate, 10 Minn. 78.

tendency of such precedent." And he adds that "such a constitutional provision does not address itself to our minds with any favor."

This definite opinion sufficiently suppressed the legislature, and no further requests appear. But the executive department evidently did not grasp that the reasons given applied to it as well. In *Rice v. Austin*,²⁹⁶ an action brought against the governor, this official, through the attorney-general, asked the court for an opinion as to the construction of Laws 1869 c. 96. The court declined to comply with this request for the reasons stated in 10 Minnesota 78. Again in *State v. Dike*,²⁹⁷ the secretary of state made a similar request, with the same result. Since then the supreme court has been undisturbed by extra-judicial interrogation.

h. *Connecticut*. The judges of the supreme court in Connecticut (perhaps because of New England influence) were at first not averse to expressing extra-causal opinions upon questions of constitutional law. Acting by direction of the general assembly, the governor, in 1863, requested their opinions as to the constitutionality of the Soldiers' Voting Act of December 24, 1862.²⁹⁸ The judges, without question, examined the statute and certified to the governor that it was unconstitutional. Later "in accordance with the settled policy of the state and the presumed expectation of the Assembly," they furnished to the reporter their reasons for the opinion.²⁹⁹ In 1865 an opinion was given, in response to a direct interrogation from the assembly, as to whether a negro was a "citizen of the United States" within the Constitutional Amendment of October, 1845. Here there was no discussion at all.³⁰⁰

²⁹⁶ 19 Minn. 103.

²⁹⁷ 20 Minn. 363.

²⁹⁸ Questions re Soldiers' Voting Acts are the subject matter of an advisory opinion in 44 N. H. 633 (1863).

²⁹⁹ Opin. of the Judges of the Supreme Court, 30 Conn. 591.

³⁰⁰ Opin. of the Judges of the Supreme Court, 32 Conn. 565.

But two years later this growing practice came to an untimely end.³⁰¹ The assembly requested an opinion as to certain proposed legislation for taxing the incomes from United States bonds held by inhabitants of Connecticut, and the judges unanimously declined to answer. They limited their refusal to questions as to the "validity of contemplated legislation," but the objections adduced were so comprehensive as to discourage any questions at all. Such opinions would be extra-judicial, they said, and not binding on anyone; yet they might have an undesirable influence should related cases later be brought before a court. It is intimated that such judicial action is probably invalid, "both from its conflict with our judicial duties and from its conflict with the legislative duties of your honorable body." Finally they distinguish the two precedents already mentioned as cases of great importance "where an immediate opinion was needed, and where the points involved could not well be reached by ordinary litigation." But the last statement is scarcely true of the Soldiers' Voting Acts, for the constitutionality of these was actually tested in regular judicial proceedings.³⁰² The truth seems to be the judges wished to check a practice to them undesirable, before the force of precedent became irresistible.

i. *Vermont*. The Soldiers' Voting Act in this State³⁰³ provided (s. 12) that: "This act shall not take effect until the Governor submits the same to the Judges of the Supreme Court, with the inquiry 'Are the provisions of this act constitutional?' and until the Governor has obtained in writing the opinion of said Judges thereon; and if the said Judges decide that the provisions of the act, or certain parts thereof, are unconstitutional, then the same, or such parts thereof as

³⁰¹ Reply of the Judges of the Supreme Court to the General Assembly, 33 Conn. 586.

³⁰² *Chase v. Miller* (Penn.) Am. L. Reg. 2 (N.S.) 146; *Morrison v. Springer*, 15 Ia. 304; *State ex rel. v. Main* (Wis.), see 15 Ia. 340.

³⁰³ L. 1863, No. 5.

said Judges shall decide are unconstitutional, shall be null and void, and the residue thereof shall remain in full force and virtue." The governor submitted the Act to the judges in January, 1864, and the latter gave their opinions in writing on April 1st, complaining only that they had not enjoyed the advantages of argument by counsel.³⁰⁴

The success of this interrogation evidently prompted the legislators to perpetuate the practice, for in L. 1864 No. 70, we find a provision that the judges shall reply in writing, when the governor submits questions of law concerning the discharge of his duties.³⁰⁵ This continued in force³⁰⁶ almost to the date of writing. It was repealed (by a bill introduced in the senate) on March 30, 1915.³⁰⁷ However, I have been unable to discover a single reference made by the governor under the statute. It might be argued that its repeal is indicative of a feeling in the legislature that such opinions are undesirable.

j. *Kentucky*. A single advisory opinion was given by the court of appeals in Kentucky in 1881, on a matter directly concerning the court itself.³⁰⁸ The governor referred a question as to his constitutional power to fill by appointment a vacancy in the court, where the unexpired term was greater than one year. That the question was not hypothetical appears from the reply which contains official notice of the recent death of Cofer, J. However in 1895,³⁰⁹ the judges indicated an unwillingness to give *ex parte* opinions in cases which might be

³⁰⁴ Opin. of the Judges of the Supreme Court, etc., 37 Vt. 665.

³⁰⁵ "The governor, when the interests of the State demand it, may require the opinion of the judges of the Supreme Court or a majority of them upon questions of law connected with the discharge of his duties. And the judges of the Supreme Court, or any of them, shall give, in writing, their opinion upon such questions."

³⁰⁶ Rev. L. 1880, s. 795; Pub. St. 1906, s. 1341.

³⁰⁷ L. Vt. 1915, No. 84.

³⁰⁸ Opin. of the Judges of the Court of Appeals, 79 Ky. 621.

³⁰⁹ In re Board of Sinking Fund Commissioners, 32 S. W. 414. The opinion is marked: "Not to be officially reported;" and is not included in the Ky. reports.

brought before them in some regular judicial proceeding, although they expressly refrained from deciding the question of jurisdiction, and, semble, based their refusal to reply to the Board of Sinking Fund Commissioners on the ground that "the court would be as much embarrassed in determining the questions made as the commissioners."

k. *Ohio*. In *State v. Baughman* (1882),³¹⁰ the justices of the Ohio supreme court took the stand that advisory opinions should not be given except under a constitutional clause requiring them. The general assembly had directed the attorney-general to institute *quo warranto* proceedings against the police commissioners of Xenia, and if possible to procure the decision of the supreme court on several constitutional questions suggested. The position of the court is clearly stated by Johnson, J.: "It is only so far as these several questions are involved in the *title* to the offices in question that this court is authorized to answer them. . . . A decision on any of the questions suggested, not necessary to a determination of the right of defendants to exercise these functions would not be a judicial settlement of such questions, but would be without authority conferred by the constitution to make it. . . . If the judiciary were to assume to decide hypothetical questions of law not involved in a judicial proceeding in a cause before it, even though the decision 'would be of great value to the general assembly' in the discharge of its duties, it would, nevertheless, be an unwarranted interference with the functions of the legislative department that would be unauthorized, and dangerous in its tendency."

l. *Nebraska*. The advisory opinion has flourished extra-constitutionally in Nebraska to as great an extent as it did in Missouri and almost as great as in South Dakota under a constitution. Ten opinions were given in a period of ten years, four to executive organs, six to one or both houses of the legis-

³¹⁰ 38 Ohio St. 455.

lature. The first one recorded was in 1883,³¹¹ where the house of representatives asked the supreme court judges questions in connection with contemplated legislation regulating the management of railroads in Nebraska. The judges complied cheerfully, but their answers were given with diffidence because of the lack of legal assistance. The same year, questions regarding the investment of school funds were referred, by the Board of Educational Lands (which included the governor), for the justices to answer "if not inconsistent with their duties." They promptly replied that such a function was not inconsistent with their duties and proceeded to give the opinions requested.³¹² But after complying with two more requests of a similar nature—one from a board which did not include the governor,³¹³ one from the auditor of public accounts³¹⁴—the court made a rule,³¹⁵ in 1887, that "no questions not matters of actual litigation, except when presented by either house of the legislature or a committee thereof, shall be presented to the court, save in the method prescribed by section 567 of the Code, and all such questions shall be filed and docketed as other causes." The legislature readily availed itself of the implied permission herein contained, and five opinions are recorded in 1889 and 1891.³¹⁶ All of these, except the first, were entered on the docket under Rule 23, and counsel for both sides (as well as an *amicus curiae* in one case) were heard by the court before an opinion was given. This obviated the objection raised in 15 Nebraska, 679, but there were more serious breakers ahead.

³¹¹ In re Railroad Commissioners, 15 Neb. 679.

³¹² In re School Fund, 15 Neb. 684.

³¹³ In re Board of Public Lands and Buildings, 18 Neb. 340.

³¹⁴ In re Babcock, 21 Neb. 500.

³¹⁵ Rule No. 23 of July Term, 1887, in 22 Neb. 11.

³¹⁶ In re State Warrants, 25 Neb. 659; In re Appropriations for Deputies, etc., 25 Neb. 662; In re Senate File 31, 25 Neb. 864; In re Quaere of the Procedure of the Two Houses, etc., 31 Neb. 262; and In re House Roll 284, 31 Neb. 505.

In 1893, the board of public lands and buildings submitted to the court questions as to their statutory duties. Maxwell, C. J., and Post, J., answered without comment, but Norval, J., forcibly declined to give any opinion.³¹⁷ As the reference was not within Rule 23, the justices had not had the benefit of legal assistance, and that is a point of objection; but the dissenting opinion further declares that it is the duty of the court to pass upon the constitutionality of statutes only in actual litigations, and that even the legislature could not increase the jurisdiction of the court.³¹⁸ The justice asserts that he had given his opinion reluctantly in the two preceding cases, and was convinced that, overloaded with regular business as the court then was, in justice to litigants, they should "call a halt." He won the rest of the court over to his way of thinking, for in the rules of January 4, 1894,³¹⁹ we find (Rule No. 23) that "only questions involved in matters of actual litigation before the court will be entertained or judicially determined, and no opinion will be filed in answer to any merely hypothetical question." This has been the rule to the present time.³²⁰ In conformity therewith, the judges have refused to give any administrative advice whatever, even in connection with a regular action before the court.³²¹

m. *Oklahoma*. The practice introduced in New York in 1829 of gubernatorial interrogation of the judges in capital

³¹⁷ In re Board of Purchase and Supplies for State Institutions, 37 Neb. 425.

³¹⁸ Cf. *Miller v. Wheeler*, 33 Neb. 765.

³¹⁹ 37 Neb. xiii.

³²⁰ See Rule No. 32 of Feb. 17, 1898, in 52 Neb. xviii, and Rule No. 17 of Feb. 1, 1914, in 94 Neb. xv.

³²¹ "The questions which may arise under this . . . revenue act . . . are innumerable, but until they are brought here in a proper proceeding, and we have had the benefit of argument and examination, we cannot undertake a duty which the law itself imposes upon those appointed to administer it, or lay down rules in advance of any controversy." Per Sullivan, C. J., in *State v. Fleming*, (1903) 70 Neb. 523.

cases where the defendant has been convicted³²² was adopted in Oklahoma in 1903.³²³ The supreme court gave an opinion in such a case, though with hesitation, in 1908,³²⁴ but the following year³²⁵ they unanimously refused further compliance with the statute. The opinion given on that occasion states that there is grave doubt as to whether the Act is constitutional, since it "purports to impose on this court a duty which, if discharged, would amount neither to a judicial act, nor one to be performed in a judicial manner, but one which, in effect, would make the judges of this court, or some one of them, advisers of the Governor." But even if the constitutionality be waived, they claimed all criminal jurisdiction had passed to the newly created Criminal Court of Appeals, and "any authority to express an opinion is in that court."

The next case of this description that came before the governor was referred by him to the Criminal Court of Appeals.³²⁶ The judges thereof readily gave their advice, saying it was unnecessary to consider the constitutionality of the statute, "as an opinion of this kind has not the force of an adjudication, and is merely persuasive or, at most, advisory." Subsequently two opinions were given without comment.³²⁷ But in 1911,³²⁸ the judges stated that the intention of the statute was to require an opinion only "where an appeal has not been taken

³²² See p. 65 *supra*.

³²³ Wilson's Rev. and Ann. St. of 1903, ss. 5588-9: "The judge of a court at which a conviction requiring a judgment of death is had must, immediately after the conviction, transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial. The Governor may thereupon require the opinion of the Judges of the Supreme Court or any of them upon the statement so furnished." This is in Snyder's St. ss. 6927-8.

³²⁴ State v. Johnson, 21 Okla. 40.

³²⁵ In re Opin. of the Judges, 25 Okla. 76.

³²⁶ Opin. of the Judges, 3 Okla. Cr. 315.

³²⁷ In re Opin. of the Judges, 4 Okla. Cr. 594; In re Opin. of the Judges, 6 Okla. Cr. 18.

³²⁸ In re Opin. of the Judges, 6 Okla. Cr. 210.

from a judgment and sentence of death;" and in 1912,³²⁹ in the last case reported, an opinion was refused on this very ground, as "it would be improper for the judges to express any opinion in an *ex parte* proceeding as to the rights of a defendant which may afterwards be brought before them by appeal, where all parties interested would be represented. To pass upon such questions in advance of an appeal would be to deprive a defendant of his constitutional right to be heard in his own behalf."

Summary. A review of the practice in the twelve States considered above will show that there is a pronounced tendency in recent years for the courts to put a stop to the giving of extra-judicial advice where it is not required by the constitution. Most of the precedents enumerated above are of remote date, and many of them have been expressly repudiated. Of those States where there was an attempt to exact some form of advisory opinion by statute, one has repealed the requirement, one has suffered its judicial impugnement to go unquestioned, and two still treasure it in the dark closets of supererogatory legislation, "unwept, unhonor'd and unsung." Only in Oklahoma has such a requirement been put to the test in the last twenty years, and there even the exiguous consultation permitted by the statute has been reduced to the vanishing point by judicial construction. It may, then, be stated as a settled principle of our constitutional law that the justices of the State supreme courts are under no obligation to render extra-judicial advice or assistance to the executive or legislative departments, even though bidden to do so by legislative enactment. There is even some doubt as to whether they may constitutionally yield to importunities for such advice.³³⁰

³²⁹ In re Opin. of the Judges, 8 Okla. Cr. 467.

³³⁰ See Reply of the Judges, etc., 33 Conn. 586; In the matter of the Application of the Senate, 10 Minn. 78; In re Board of Purchase and Supplies for State Institutions, 37 Neb. 425, per Norval, J.; Opin.s of the Justices, etc., 64 N. C. 785, per Reade, Rodman and Settle, JJ.; and State v. Baughman, 38 Ohio St. 455.

C. IN CANADA

1. *The Dominion.*

The historical development of the advisory opinion in Canada is very interesting and instructive for several reasons. We have here an example of a federal supreme court bound to advise the executive department in a great variety of cases. We have an unquestioned and explicit enumeration of the cases wherein the obligation exists. We have an authoritative and controlling statement as to the effect of such opinions. Furthermore, the majority of the constituent member-states have incorporated the same practice into their constitutional systems. Of course, there are certain very important differences between the situation in the United States and that in Canada. The Canadian supreme court is the creature of the legislature, acting within section 101 of the British North America Act of 1867. Thus the legislature was, and is, in a position to define the duties and jurisdiction of that court, as long as it avoids conflict with the other sections of the act. The provincial legislatures are equally supreme by virtue of section 92, paragraph 14, of the same act. It will be noted later that this practically eliminates the separation of powers argument from consideration. The judges are not even as free to discriminate as were their judicial ancestors in the mother country, at least since the end of the seventeenth century.

The Dominion legislature first created a supreme court for the federation in 1875,³³¹ and provided in the same act for the giving of advisory opinions to the governor-general in council. The clause covered any matter which the latter thought "fit" to refer.³³² There is evidence of judicial disapproval as early as 1879. In *Queen v. Robertson*,³³³ Strong, J., says:

³³¹ 38 Vic. c. 11.

³³² For the text of the provision see Appendix II.

³³³ 6 Can. S. C. R. 127.

"In the case of private suitors, if a special case appears to be framed for the purpose of eliciting an opinion upon a question, the decision of which is not essential to determine the rights of the parties, the court will refuse to entertain it, and I see no reason why the same rule should not be applied to a case in which the Crown is a party. As the case is presented to the court it appears that the officers of the Crown have arranged to pay the suppliant, not damages, but a gratuity, in the event of the court being of the opinion that the Crown had no authority to grant the license in question. This is to invoke an advisory, not a contentious, jurisdiction, and such a jurisdiction . . . ought not to be exercised unless conferred by statute, which has not been done." But his brethren on the bench did not agree with him and he went on to express his opinion.

Five references were made under the provision prior to 1892,³³⁴ but the possibilities of the device and the important results of its frequent use were evidently overlooked. In fact in 1884 the legislature passed an act³³⁵ which specially provided (s. 28) that the supreme court should determine, on reference from the governor-general, as to the competency of the legislature to pass "The Liquor Licence Act, etc." in whole or in part.³³⁶ And in his recommendation that certain questions be referred, Sir John Thomson, minister of justice, said (in 1889): "This provision which confers that power on your Excellency was undoubtedly intended to enable the Governor-General

³³⁴ In re New Brunswick Penitentiary, April, 1880; In re Canada Temperance Act of 1878, and County of Perth, Cass. Dig. 105; In re Canada Temperance Act of 1878, and County of Kent, Cass. Dig. 106; The Thrasher Case, Cass. Dig. 480; The Manitoba Railway Crossings Case. See Cameron, p. 267.

³³⁵ 47 Vic. c. 32.

³³⁶ Idington, J., argues from this that s. 37 of the original Supreme Court Act did not authorize questions to be referred re the competence of the legislature to pass pending or possible bills. 35 Can. S. C. R. 581, at 596. But it seems more probable that the provision was either a superfluity due to forgetfulness or an example of over-abundant caution.

to obtain an opinion from the Supreme Court of Canada in relation to some order which his Government might be called upon to make, or in relation to some action which his officers might be called upon to adopt."³³⁷

More careful definition was obviously in order and in 1891 the section was amended³³⁸ to cover "important questions of law or fact touching provincial legislation, or the appellate jurisdiction as to educational matters vested in the Governor in Council by the 'British North America Act, 1867,' or by any other act or law, or touching the constitutionality of any legislation of the Parliament of Canada, or touching any other matter with reference to which he sees fit to exercise this power." It was added that the opinions should be given "in like manner as in the case of a judgment upon an appeal to the said court." Furthermore the statute required that the attorney-general of a province interested in any question should be notified of the reference and heard in argument, and provided that the court in its discretion might notify any persons interested in any question referred of the hearing, and such persons should be "entitled to be heard thereon;" or might require counsel to argue the case as to any interest which was unrepresented, at the government's expense. Finally it declared that opinions given, "although advisory only, shall, for all purposes of appeal to Her Majesty in Council, be treated as a final judgment of the said court between parties."³³⁹

The first reference under this form of the provision seems to have been *In re County Courts of British Columbia* (1892).³⁴⁰ It related to the constitutionality of certain legislation enacted in British Columbia and of a statute of the Dominion legislature. Counsel appeared for the province and the Dominion. In the next case (1894), the justices were asked to construe

³³⁷ 12 Legal News, 286.

³³⁸ By 54-55 Vic. c. 25, s. 4.

³³⁹ For the text of the provision see Appendix II.

³⁴⁰ 21 Can. S. C. R. 446.

the British North America Act, as well as certain Manitoba statutes, and to define the powers of the governor-general in a particular instance. Taschereau, J., participated in such a case for the first time, and expressed a doubt as to the constitutionality of 54-55 Vic. c. 25, s. 4, on the ground that the court is made "an advisory board of the federal executive, substituted, *pro hac vice*, for the law officers of the Crown, and not performing any of the usual functions of a court of appeal, nay, of any court of justice whatever;" but since the point had not been raised and the answer would bind no one, he concluded to answer.³⁴¹ This is the first opinion from which an appeal was taken to the Privy Council³⁴² and it is worthy of note that the very learned Lords³⁴³ who dealt with the case there took no notice of Taschereau, J.,'s demurrer, merely recommending that the opinions of the supreme court be declared incorrect. But two of these same Lords³⁴⁴ joined a year later in an important dictum restrictive of the advisory opinion practice. The governor-general had referred eight questions concerning the power of provincial legislatures to pass prohibitory liquor laws, and asked specifically if the Ontario legislature had been within its powers in enacting 53 Vic. c. 56, as explained by 54 Vic. c. 46.³⁴⁵ The supreme court answered No to all questions and an appeal was taken to the Privy Council.³⁴⁶ The Ontario legislation was considered without question, but the Council prefaced their answers to the general questions with these words: "These differ from the question which has

³⁴¹ In re Certain Statutes of . . . Manitoba rel. to Education, 22 Can. S. C. R. 577.

³⁴² Brophy et al. v. Attorney-General of Manitoba (1895) A. C. 202.

³⁴³ Lord Herschell, L. C., Lord Watson, Lord MacNaghten, and Lord Shand.

³⁴⁴ Lord Herschell and Lord Watson.

³⁴⁵ In re Provincial Jurisdiction to Pass Prohibitory Liquor Laws, 24 Can. S. C. R. 170

³⁴⁶ Attorney-General for Ontario v. Attorney-General for Dominion et al. (1896) A. C. 348.

already been answered in this respect, that they relate to matters which may possibly become litigious in the future, but have not as yet given rise to any real and present controversy. Their Lordships must further observe that these questions, being in their nature academic rather than judicial, are better fitted for the consideration of the officers of the Crown than of a court of law. The replies to be given to them will necessarily depend upon the circumstances in which they may arise for decision. . . . It must therefore be understood that the answers which follow are not meant to have, and cannot have, the weight of a judicial determination, except in so far as their Lordships may have occasion to refer to the opinions which they have already expressed in discussing the seventh question."³⁴⁷ Taschereau, J., referred to this dictum with approval in the Provincial Fisheries case,³⁴⁸ where, too, he repeated his statement that the opinions given to the governor-general "bind no one, not even ourselves."³⁴⁹ On appeal,

³⁴⁷ *L.c.* at p. 370. See also the words of the Judicial Committee in *Attorney-General for Ontario v. Hamilton Street Railway Company et al.* (1903) A. C. 524, an appeal from an advisory opinion statute in Ontario: "It would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion upon those questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down and over-ride the operation of particular words when the concrete case is not before it." (at p. 529).

³⁴⁸ In the matter of Jurisdiction over Provincial Fisheries, 26 Can. S. C. R. 444.

³⁴⁹ "Our answers are merely advisory, and we have to say what is the law as heretofore judicially expounded, not what is the law according to our opinion. We determine nothing. We are mere advisers, and the

the Privy Council refused to answer questions in this same case concerning the rights of riparian owners, because the latter were not parties to the litigation.³⁵⁰

But the dictum of the Privy Council in 1896 only came to full fruition in 1905 and 1906. The governor-general referred to the supreme court questions concerning the right of the Ontario legislature to enact certain statutes, past and pending, and concerning the right of provincial legislatures in general to pass Sunday labor acts.³⁵¹ One of the counsel who appeared questioned the jurisdiction of the court in his argument. The majority of the court agreed that the hypothetical questions of a general nature proposed were not "within the purview of the section." They admitted that questions as to the constitutionality of existing legislation were within the section, but claimed that the words "touching any other matter" should be considered "as within the rule *ejusdem generis*," and might refer to administrative or departmental orders issued pursuant to a statute. However, since the practice had been for the supreme court, and the Privy Council as well, to answer questions similar to those under discussion, they would give their opinions. Sedgewick, J., dissented on the grounds that the amendment of 1891 was not intended to limit the governor's power of reference, and that the rule *ejusdem generis* did not apply (though even if it did, he thought the reference here was within that rule). Idington, J., dissents from both these views very forcibly. In a cogent argument of some

answers we give bind no one, not even ourselves. The questions are of the nature of those upon which the Privy Council in the recent case made remarks that will, I hope, restrict in the future references such as the present one by the Department of Justice." Cf. the remarks of the same judge in the Prince Edward Island representation case, 33 Can. S. C. R. 594.

³⁵⁰ Attorney-General of Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia (1898) A. C. 700.

³⁵¹ In the matter of the Jurisdiction of a Province to Legislate Respecting Abstention from Labor on Sunday, 35 Can. S. C. R. 581.

length, he insists that there is no sound authority from precedent or statute to give opinions on speculative questions. He closes his refusal in these words: "The jurisdiction to pass upon proposed or only possible future legislation, such as the governing power of the people might never assent to, is one of so grave a character, fraught with such far-reaching consequences, and such a departure from the recognized principle of severing and keeping as distinct as possible the respective powers and duties of the legislative, executive and judicial functions of Government, that I would desire to see the power we are asked here to exercise distinctly and clearly conferred by Parliament, if it is to be conferred at all, rather than by an assumption of its existence on such slender basis as is alleged here to have expressed its existence."

The legislature was not slow to give the learned justice the assurance asked, and at the same time dealt conclusively with the *ejusdem generis* argument. By 6 Edward VII c. 50, in addition to the questions enumerated in the 1891 statute, the governor in council was empowered to refer important questions touching the powers of the Dominion or provincial legislatures, "whether the particular power in question has been or is proposed to be executed," or touching "any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations," and "any question touching any of the matters aforesaid, so referred by the governor in council shall be conclusively deemed to be an important question." This last provision is probably the result of practice in the United States, since there is no indication that the Canadian judges were disposed to test the magnitude of a question's importance. The present form of the advisory opinion clause, as included in the Supreme Court Act of 1906,³⁵² is practically a re-enactment of the provisions of 1891, as amended by the statute of Edward VII.

³⁵² R. S. C. 1906, c. 139, s. 60. See text in Appendix II.

Still, under such an explicit enactment, there were rumblings of judicial unrest. In a reference as to the powers of the attorney-general's deputies in Alberta and Saskatchewan under the Criminal Code,³⁵³ Davies, J., says the first three questions practically request the justices to sit as a court of appeals over the judgment of the supreme court of Saskatchewan in *The King v. Duff*, and only answers with great reluctance under the imperative provisions of the statute. Anglin, J.,'s reply is to the same effect. Girouard, J., only yields because the opinion can have no legal effect; and the persistent Idington, J., doubts whether section 101 of the British North America Act is broad enough to permit the legislature to make the supreme court a "court or commission of general inquiry," as is done in the act of 1906. Finally the constitutionality of that statute came squarely to an issue in 1910.³⁵⁴ The governor's reference included both general and particular questions regarding the powers of provincial legislatures, under the British North America Act, to incorporate companies (especially insurance companies) and regarding the constitutionality of the Insurance Act of 1910 (Dominion). The counsel who appeared at the hearing protested against any consideration of the questions, arguing that section 60 of the Supreme Court Act of 1906 was *ultra vires*, and that previous opinions were all given in cases where everyone interested had consented, so that the question of constitutionality had never been raised. They claimed, too, that the provincial courts would feel bound as if the opinion were a judgment. Fitzpatrick, C. J., felt bound to answer, both by the statute and the precedents, subject to the right of the court "to make all proper representations if it appears to us during the course of the argument, or thereafter, that to answer such questions might in any way

³⁵³ In re Criminal Code, 43 Can. S. C. R. 434.

³⁵⁴ In re References by the Governor-General in Council, 43 Can. S. C. R. 536.

embarrass the administration of justice." He states clearly that in his opinion the judges of the Canadian supreme court are the official advisers of the executive, after the English model. Girouard, J., dissented from this, holding that section 60 (1) b was *ultra vires*. Duff, Anglin and Davies, JJ., all agreed with the chief justice. The last mentioned justice thought that the statute was within the British North America Act, s. 101, since practically it made the justices an "additional court for the better administration of the laws of Canada." Idington, J., of course, dissented. Courts should not be forced to prejudge cases, he said, and when referred questions concerned matters in dispute between the Dominion and the provinces, to reply was like expressing an opinion to a possible litigant in advance. Moreover, by section 91 of the British North America Act, the Dominion Parliament had no power over subjects assigned exclusively to provincial legislatures. The administration of justice in the provinces had been assigned to them, and Parliament could only create a court of appeal, and courts to administer the laws of Canada.

The provinces promptly appealed the question of jurisdiction to the Privy Council.³⁵⁵ Here the whole matter was carefully considered by Lords of great erudition,³⁵⁶ and the constitutionality of the statute was unanimously sustained. The elaborate argument of the appellants is exceedingly interesting because of its bearing on the theory of advisory opinions,³⁵⁷ but is almost entirely irrelevant to the constitutionality of the act. It is for the most part merely a "commentary on the wisdom of such an enactment," emphasizing the possible perversion of justice in the operation of the act. But "the

³⁵⁵ Attorney-General for Ontario v. Attorney-General for Canada (1912) A. C. 571.

³⁵⁶ Earl Loreburn, L. C., Lord MacNaghten, Lord Atkinson, Lord Robson, and Lord Shaw of Dunfermline.

³⁵⁷ It is thus summarized in the judgment: "The argument on behalf of the provinces proceeded upon the following lines. They said that the power to ask questions of the supreme court sought to be bestowed . . .

argument that to put questions is *ultra vires*, must be the same whether the principle is rightly or wrongly used." The Lord Chancellor admitted the possibility of abuse, with attendant evils, but did not think it imminent, because the answers were only advisory, and because the justices could qualify their replies if the questions did not admit of accurate answers or could "make the necessary representation to the Governor-General in Council." But even abuse did not import unconstitutionality. "What in substance their Lordships are asked to do is to say that the Canadian Parliament ought not to pass laws like this because it may be embarrassing and onerous to a Court, and to declare this law invalid because it ought not to have been passed." In effect the *ratio decidendi* of the opinion of the Privy Council is that the presumption that the statute is constitutional has not been overcome by the argument as to desirability put forward by the appellants. But incidentally

by the impugned act, is so wide in its terms as to admit of a gross interference with the judicial character of that court, and, therefore, of grave prejudice to the rights of the provinces and of individual citizens. Any question . . . can be put to the supreme court and they are required to answer it, with their reasons. Though no direct effect is to result from the answer so given, and no right or property is thereby to be adjudged, yet, say the appellants, the indirect result of such a proceeding may be and will be most fatal. When the opinion of the highest Court of Appeal for all Canada has been given upon matters both of law and of fact, it is said it is not in human nature to expect that, if the same matter is again raised upon a concrete case by an individual litigant before the same Court, its members can divest themselves of their preconceived opinions; whereby may ensue not merely a distrust of their freedom from pre-possession, but actual injustice, inasmuch as they will in fact, however unintentionally, be biased. The appellants further insist that although the Act in question provides for requiring argument, and directing that counsel shall be heard before the questions are answered, yet the persons who may be affected by the answers cannot be known beforehand, and therefore will be prejudiced without so much as an opportunity of stating their objections before the Supreme Court has arrived at what will virtually be a determination of their rights."

the Lord Chancellor goes on to strengthen the presumption of constitutionality by reviewing the English practice of judicial consultation, and by pointing out that apparently the thought of unconstitutionality was not entertained by any of the learned Lords who had considered the six previous appeals from opinions rendered under the Canadian statute.

So the advisory opinion will undoubtedly remain in the Canadian system until the Parliament decides that its use is unwise. There is no indication that Parliament is so minded at present. The device has been employed very sparingly, and the evil effects, if any, have not been apparent. I have been able to discover only eighteen references during a period of forty-one years. Of these, appeals were taken to the Judicial Committee of the Privy Council in seven cases.

Before passing on to consider advisory opinions in the provinces, mention might be made of two other forms of extra-causal advice under Dominion legislation. The Railway Act makes it a duty of the supreme court³⁵⁸ to give its opinion upon questions of law involved in any case stated by the board, whether "of its own motion" or at the request of the governor in council or of a third party. The justices have given opinions freely under this section. Also section 61 of the Supreme Court Act of 1906 provides that the senate or house of commons may, by a rule or order, refer any private bill or petition to the court or any two of the judges, for an opinion thereon.³⁵⁹

³⁵⁸ "1. The Board may, of its own motion, or upon the application of any party, and upon such security being given as it directs, or at the request of the Governor in Council, state a case, in writing, for the opinion of the Supreme Court of Canada, upon any question which in the opinion of the Board is a question of law.

2. The Supreme Court of Canada shall hear and determine the question or questions of law arising thereon, and remit the matter to the Board with the opinion of the Court thereon." 3 Edw. VII, c. 58, s. 43. See R. S. C. 1906, c. 37, s. 55.

³⁵⁹ "The Court, or any two of the judges thereof, shall examine and report upon any private bill or petition for a private bill presented to the

According to Cameron,³⁶⁰ only one bill has been referred under this section—the Bill to Incorporate the Christian Brothers.³⁶¹

2. *The Provinces.*

Seven of the nine provinces have adopted the advisory opinion,³⁶² and in all of them, as in the Dominion, the provision is, of course, statutory. In three of them the enactment antedated the first revision of the Dominion act on the same subject, for the advisory opinion statutes in Ontario, Nova Scotia and Manitoba are all dated 1890. By referring to Appendix II, it will be seen that the text is very much the same in all three statutes, and the improvements upon the Dominion act of 1875 evidently furnished the basis for the later amendments to that act. It would seem that one of these was the antetype of the other two, but I have been unable to ascertain which is earliest in point of time. The title of the Ontario statute is interesting as throwing some light on the chief purpose of the scheme. It is called "An Act for expediting the decision of Constitutional and other provincial Questions." The scope of the permission to refer is very broad, covering any matter which the lieutenant-governor in council "thinks fit to refer," as in the 1875 Dominion act. But in the provincial acts further particularization has not taken place, no amendments having been made to the original statutes. In all three cases, the opinion, with reasons, is to be given "in like manner as in the case of a judgment in an ordinary action." Also they all provide that if the question relates to the constitutionality of a provincial statute, the attorney-general of Canada shall be notified, "in order to be heard if he sees fit;" and in general that at the discretion of the court, any person or persons interested in any question referred might be notified

Senate or House of Commons, and referred to the Court under any rules or orders made by the Senate or House of Commons." R. S. C. 1906, c. 139, s. 61.

³⁶⁰ Supreme Court Practice, p. 268.

³⁶¹ 1876. Cass. Prac. 59.

³⁶² See text of these provisions in Appendix II.

of the hearing, for the same purpose; and if any interests affected are not represented by counsel, the court may appoint counsel to act in their behalf, at public expense. But the effect of the opinion given varies. In the statutes of Ontario and Manitoba, the opinion "shall be deemed a judgment of the court, and an appeal will lie therefrom as in the case of a judgment in an action." But in the Nova Scotia act, the opinion is declared to be advisory, and is to be treated as a final judgment of the court only for purposes of appeal to the Canadian supreme court or to the Privy Council.

British Columbia followed closely in the steps of these three, enacting a statute in 1891, which differed from the Manitoba statute in only one important particular—there was no provision for the appointment of counsel to argue for interests not represented. The same omission occurs in the Quebec act of 1898; also here there is no provision for notifying the Canadian attorney-general in references connected with the constitutionality of provincial legislation. Also in section 4 it is declared that the opinion is advisory only and cannot be appealed from. This is undoubtedly the result of *Union Colliery Company of British Columbia v. Attorney-General of British Columbia et al.*,³⁶³ where Taschereau, J., held that no appeal would lie to the Canadian supreme court from an opinion given by the supreme court of British Columbia under the statute; he declared there was no action, no parties and no controversy, and that the British Columbia legislature could not extend the jurisdiction of the Canadian supreme court by enacting that opinions given as in this case should be "deemed a judgment." Still Saskatchewan did not benefit by this decision, for the "Act respecting the Decision of Constitutional and other Legal Questions," of 1901, is in all essential particulars identical with the Ontario act of 1890. The New Brunswick statute was passed in 1906.

³⁶³ 27 Can. S. C. R. 637.

Very little use has been made of the privilege granted by these statutes. I have found only four references in Ontario. In three of these,³⁶⁴ appeals were taken to the Privy Council, which considered them without hesitation.³⁶⁵ The fourth case³⁶⁶ is interesting because of the careful examination of the advisory opinion act. The question referred concerned the construction of a section of the Ontario Medical Act, 1897—did the words “to practice medicine” cover cases where drugs and similar substances were not used? All of the judges were reluctant to answer because of the difficulty of making a categorical reply to so general a question; Meredith, J. A., also objected on the ground that the reference was practically an appeal from *Reg. v. Stewart*.³⁶⁷ The majority replied, in substance, that the phrase in question might cover such cases, but that each would have to be decided on its own merits. Moss, C. J. O., observes that in spite of the statutory declaration that such an opinion “shall be deemed a judgment,” it is really “for the information of the Lieutenant-Governor in Council” and is only advisory in character.

But one case from British Columbia has come to my attention, the question as to the Coal Mines Regulation Act already mentioned.³⁶⁸ A single reference has been made in Nova Scotia, a reference in 1916 regarding the Nova Scotia Temperance Act, upon which argument has not yet been heard (January 29, 1917). The Attorney-General of New Brunswick informs me that no references for advisory opinions have been

³⁶⁴ Attorney-General of Ontario v. Attorney-General for Dominion of Canada (1894) A. C. 189; Attorney-General for Dominion v. Attorney-General for Ontario (1898) A. C. 247; Attorney-General for Ontario v. Hamilton Street Railway Company et al. (1903) A. C. 524.

³⁶⁵ Cf. Union Colliery Company of British Columbia v. Attorney-General of British Columbia et al., 27 Can. S. C. R. 637.

³⁶⁶ In re Ontario Medical Act (1906), 13 Ont. L. R. 501.

³⁶⁷ 17 Ont. R. 4.

³⁶⁸ See p. 91 *supra*.

made in that province, and I have discovered none in Quebec, Manitoba or Saskatchewan.

In at least two provinces there is a scheme for testing the constitutionality of legislation that might be mentioned in passing. It is provided both in Ontario³⁶⁹ and in Alberta³⁷⁰ that the supreme court shall have jurisdiction to entertain an action at the instance of either the attorney-general for the Dominion or the attorney-general for the province for a declaration as to the validity of any statute, or any provision in any statute (of the province), "though no further relief should be prayed or sought."³⁷¹ Very few applications have been made under these acts. An example of such an application in Ontario is *Attorney-General of Canada v. Attorney-General of Ontario*,³⁷² where the supreme court for the Dominion allowed an appeal from a declaration by the Ontario court.³⁷³ Also it is provided in section 113 of the Alberta Land Titles Act that whenever a question arises as to the registrar's duties under the act, or as to the construction or legal validity of any instrument, the registrar may refer the same to a judge of the supreme court, and the judge shall decide the question.

D. IN OTHER STATES

One evidence of the strong Anglo-American influence in the Hawaiian Islands in the middle of the nineteenth century is the incorporation of an advisory opinion clause (on New England principles) in the constitution of 1852 (Article 88). This was repeated as Article 70 of the constitution of 1864 and

³⁶⁹ Judicature Act, R. S. O. c. 51, s. 57 (2).

³⁷⁰ Judicature Ordinance, s. 8 (6).

³⁷¹ Cf. N. J. Comp. Stat. IV, 4978, and 83 N. J. L. 303, for a case under a somewhat similar statute.

³⁷² 33 S. C. R. 458.

³⁷³ Cf. *Union Colliery Company of British Columbia v. Attorney-General of British Columbia et al.*, 27 Can. S. C. R. 637.

(with slight changes) as Article 70 of the constitution of 1887. It gave the king, cabinet or legislature power "to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions." Thayer³⁷⁴ says a number of opinions have been given under this clause, beginning with one of 1884.³⁷⁵

A very interesting constitutional device is contained in the Colombian constitution of 1886. The president is given a qualified veto on all legislation, having the power to force repassage by two-thirds of the members of each house if he returns a bill with objections in from six to fifteen days (depending upon the length of the bill). But if he objects on the ground that the bill is unconstitutional and if the legislature insists on its passage, the bill is to be referred to the supreme court, which has six days to decide upon its acceptability. If the decision favors the president's objections, the bill fails; if not, it must be sanctioned and promulgated by the executive.³⁷⁶ The people seem to have been satisfied as to the value of such an unusual arrangement, for the Panamans repeated it in their constitution of 1904.³⁷⁷ I have not been able to ascertain whether the supreme court is called upon to act under this clause very frequently or at all.

Colombia is responsible for still another strange provision regarding the judiciary. Article 84³⁷⁸ of the constitution of 1886 gives the judges of the supreme court the privilege of being heard by the legislature "in the discussion of bills relating to civil matters and judicial procedure." Three states have copied this clause, with some variations in the wording—Salvador (Constitution of 1886, Article 79), Honduras (Constitution of 1904, Article 83) and Nicaragua (Constitution of 1905,

³⁷⁴ Cases I, 176 n.

³⁷⁵ The Segregation of Lepers, 5 Haw. Rep. 162.

³⁷⁶ For the text of the provision see Appendix III.

³⁷⁷ Article 105. For the text of the provision see Appendix III.

³⁷⁸ For the text see Appendix III.

Article 71).³⁷⁹ All of these imitators, however, go even farther than Colombia, for they permit the judges to introduce or originate bills relating to the codes of the republic as well as as to be heard in the discussion of all such bills not coming from them. The desirability of such provisions will be considered in a later chapter.

³⁷⁹ For the text of these provisions see Appendix III.

CHAPTER II

THE ADVISORY OPINION IN PRACTICE

A. THE SOURCE OF INTERROGATIONS

The cases considered in the subsequent discussion include (unless otherwise stated) only the opinions rendered in the eight States of the Union where the advisory opinion has existed under the constitution. The reports yield a total of four hundred and ten such opinions. Fifty-one of these are credited to Florida and South Dakota, where the governor alone has the benefit of the clause. The remaining three hundred and fifty-nine belong to States which permitted to the executive and legislative departments alike the right of judicial consultation. In this group the legislative department is responsible for two hundred and sixteen opinions, the executive for one hundred and forty-three. The inequality of distribution is probably due to two causes. Since the firm establishment in the United States of the judicial power to declare acts of the legislature to be null and void because of failure to conform to the constitution, it has become increasingly evident that it would often be very desirable to ascertain in advance of the passage of a measure, how the supreme court will look upon its validity if called upon to apply it. Questions with this end in view naturally issue from the legislature while the bill is under consideration. A majority of the legislative questions are of this nature, and many of the executive questions as well, for the governor has often sought advice from the supreme court before signing or vetoing bills presented to him. Of the three hundred and fifty-nine opinions, one hundred and twenty-eight were in response to questions concerning pending or possible legislation. The second cause is the fact that the

executive department has at hand a more prompt and convenient adviser in ordinary situations in the person of the attorney-general. The legislature naturally prefers the opinion of those officials, who will have to pass finally upon the matter in question, whose hostility to a project will be fatal in spite of legislative approval. The governor feels the same way in important and difficult affairs that may possibly come before a court later, but in most of the cases that call for executive decision and action, the questions of law are elementary, and it is almost certain that the executive action will be final.

A more minute examination of the initiation of inquiries in some one State may be of interest. Colorado affords the best opportunity for detailed investigation in this as in other particulars, because of the concentration of a relatively large number of cases within a few decades. In that State there have been sixty-nine legislative inquiries, thirty-six emanating from the senate, thirty-two from the house of representatives, and one from the general assembly. Six of these are questions dealing with the advisability or possibility of contemplated legislation which apparently had not yet been introduced. Fifty-eight are questions involving the constitutionality of bills actually in course of passage. In thirty-six of these sixty-four cases, I have been able to discover from house and senate journals, the immediate interrogators. In one early case the bill was referred back to the committee in charge with instructions to ask the supreme court for its opinion.¹ There are six cases where the committee in charge, or some member thereof, proposed the resolution calling upon the justices for their opinion, without any prompting.² Senators or representatives

¹ In the matter of the Constitutionality of HB. No. 18, 9 Colo. 623.

² In the matter of the Constitutionality of SB. No. 76, 9 Colo. 623; In the matter of HB. No. 231, 9 Colo. 624; In the matter of the Constitutionality of HB. No. 270 and SBB. No. 69 and No. 106, 9 Colo. 635; In the matter of the Constitutionality of Sec. 9, of HB. No. 122, 9 Colo. 639; In re HB. No. 238, 12 Colo. 337; In re Annexation and Consolidation of School Districts, SB. No. 9, 26 Colo. 136.

having a local interest in the bill under suspicion are responsible for three opinions. But in the great majority of instances, the interrogating resolution is introduced either by the member who introduced the bill under discussion (fifteen cases),³ or by the judiciary committee, usually following the directions of the house (eleven cases).⁴ The former of these two methods is the favorite *modus operandi* in recent years. These results appear to corroborate the complaint registered by O. F. A. Greene in 1890⁵ that "the supporters of a measure, in order to escape the argument of unconstitutionality by their opponents, seek such opinions, hoping for a favorable response." This particular criticism, intended as an objection, is unreasonable, for the chief value of the advisory opinion to legislatures is in ascertaining the unconstitutionality of a measure before placing it upon the statute books; and when the question of constitutionality is raised in debate already, there is no reason why the sponsor of the bill should not be the author of an inquiry regarding its constitutionality. Indeed he may be acting

³ In re HB. No. 165, 15 Colo. 593, 595; In re Bounties, 18 Colo. 273; In re Extension of Boundaries of the City of Denver, 18 Colo. 288; In re Amendments of Legislative Bills, 19 Colo. 356; In re HB. No. 203, 21 Colo. 27; In re a Bill Providing that Eight Hours shall Constitute a Day's Labor, 21 Colo. 29; In re HB. No. 107, 21 Colo. 32; In re Constitutionality of SB. No. 293, 21 Colo. 38; In re Constitutionality of an Act, 21 Colo. 46; In re Consolidation of School Districts, SB. No. 23, 23 Colo. 499; In re HB. No. 99, etc., 26 Colo. 140; In re SB. No. 142, etc., 26 Colo. 167; In re HB. No. 495, etc., 26 Colo. 182; In re House Resolution No. 10, 50 Colo. 71; In re Senate Resolution No. 4, 54 Colo. 262.

⁴ In the matter of HB. No. 38, etc., 9 Colo. 631; In re SR. Relating to the Appropriation of Moneys, etc., 12 Colo. 287; In re HR. Relating to HB. No. 116, 12 Colo. 289; In re SR. Relating to SB. No. 1, 12 Colo. 290; In re SR. Relating to SB. No. 31, 12 Colo. 340; In re HR. Relating to HB. No. 218, etc., 12 Colo. 359; In re HR. Relating to HB. No. 349, 12 Colo. 395; In the matter of the Constitutionality of SB. No. 65, 12 Colo. 466; In re HR. No. 25, 15 Colo. 602; In re Inheritance Tax, HB. No. 122, 23 Colo. 492; In re SB. No. 27, etc., 28 Colo. 359.

⁵ See p. 50 *supra*.

on the recommendation of a committee, as in 21 Colorado 27. In any case if the house deems the inquiry unnecessary, the resolution can easily be defeated.⁶ It is not easy to verify the accuracy of Greene's observation⁷ that "a legislator who finds himself in a dilemma of either favoring a measure against his judgment or of making dangerous enemies against his own pet schemes, seeks a passage of escape by thus shouldering the responsibility upon the court." Certainly it does not apply to the fifteen opinions solicited by introducers of bills. But it may apply to the eleven cases referred by the judicial committee which always acted at the request of the house in committee of the whole, so that the real author of the resolution is not discoverable. However, as the supreme court did not declare a bill unconstitutional in a single one of these eleven cases, it is certain it did not relieve many legislators from facing the judgment of their constituents. In the sixteen cases where the supreme court has pronounced a proposed measure unconstitutional, there are seven interrogatories from the author of the measure, four from the committee in charge and one from a member whose district was affected—all probably sincere and not for political effect.

B. NATURE OF QUESTIONS

The subject matter of the advisory opinions rendered in the United States covers a great variety of topics in both public law and private law. An attempt has been made in this section to bring order out of the heterogeneity by classifying the topics in five groups as follows: (1) The Legislative Department; (2) The Executive Department; (3) The Judiciary; (4) Suffrage and Elections; (5) Miscellaneous Matters. Of course, these divisions are not mutually exclusive, and one question may fall within two or even more groups and consequently may be

⁶ Such a resolution was rejected, for example, in the matter of HB. No. 14 in 1889. HJ. 1889, 360.

⁷ The Nation, Vol. 50, 50.

referred to below in more than one place. However, it will be endeavored to determine the class to which a case belongs by the element which receives the most emphasis or which is the most necessary to the inquiry. It must be remembered, too, that the same reference often comprises several different questions.

1. *The Legislative Department*

a. *Composition of the Legislature.* These cases⁸ fall into three subdivisions: questions concerning the legislative districting of a State or the apportionment of members of the legislature, questions regarding the qualifications for membership in the legislature, and questions as to the regularity of elections. In the first of these, there are thirteen opinions. The earliest one was rendered by a Massachusetts court in 1811,⁹ in reply to an inquiry as to whether towns could count aliens, as ratable polls, in determining the number of representatives to which they were entitled. The New Hampshire court in 1838¹⁰ was asked to deal with almost the same question. In both cases it was declared that liability to taxation was the criterion. The Massachusetts justices have given their opinion upon the right of representation of new towns,¹¹ and as to what apportionment applied during a certain transition period.¹² The nine other cases deal with the constitutional duties of the legislature in the matter of apportionment. Three are in Massachusetts,¹³ three in Maine,¹⁴ and three in Colorado.¹⁵

⁸ Except a single extra-constitutional case on the tenure of members of the legislature—Opinions of the Justices of the Supreme Court, etc., 64 N. C. 785.

⁹ Opin. of Justices, 7 Mass. 523.

¹⁰ Opinion, 8 N. H. 573.

¹¹ Opin. of Justices, 6 Cush. 575.

¹² Opin. of the Justices, 157 Mass. 595.

¹³ Opin. of Justices, 10 Gray, 613; Opin. of Justices, 142 Mass. 601; and In re Opinion of the Justices, 220 Mass. 609.

¹⁴ Opin. of Justices, 3 Me. 477; Opin.s of the Justices, 18 Me. 458; and Opin. of Justices, 33 Me. 587.

¹⁵ Veto Power—Special Session of General Assembly—9 Colo. 642;

In this list of thirteen, the justices answered without objection in every case, except for a partial refusal in 18 Maine, 458. But there are two outright refusals in each of the other groups. The general question of the eligibility of naturalized citizens to the house of representatives was readily answered,¹⁶ but almost the same court declined to express any opinion as to the eligibility of a special justice of a municipal, district or police court, or as to whether the election of such a justice to the legislature would vacate his judicial office,¹⁷ and a Maine court followed their example in 1901 in a very similar reference regarding fish and game commissioners and trustees of State institutions.¹⁸ In the third group, the two refusals were in response to separate inquiries by the senate and house of representatives regarding the same question.¹⁹ The governor and council had rejected votes for certain senatorial candidates in two districts because of irregularities, and had declared other candidates elected; and the senate had subsequently ratified this action. The justices refused to express an opinion upon a completed act of the executive at the request of the legislative department, as amounting to mere criticism of a coordinate branch of the government, and added that the action of the senate on the election of its members is conclusive. Then there are three opinions in Massachusetts²⁰ dealing with the electoral rights of towns. Finally there are seven opinions in Maine, delivered upon four separate occasions. The question put in 6 Maine, 486, was practically the same as in 15 Massachusetts 536, viz., if by majority vote a town having the right to elect a

In the matter of HR. re Constitutionality of Legislature Redistricting State, etc., 12 Colo. 186; and In re SR. Relating to Constitutionality of Proposed Reapportionment Bill, 12 Colo. 187.

¹⁶ Opin. of Justices, 122 Mass. 594.

¹⁷ Opin. of Justices, 122 Mass. 600.

¹⁸ Opin.s of the Justices, 95 Me. 564.

¹⁹ Opin. of the Justices, 56 N. H. 570; Opin. of the Justices, 56 N. H. 574.

²⁰ Opin. of Justices, 15 Mass. 536; Opin. of Justices, 3 Pick. 517; and Opin. of Justices, 23 Pick. 547.

representative waives that right, is the minority bound by such action? (The Maine house of representatives appended a similar question as to waiver by a majority of towns in a district). The Massachusetts justices thought the right to elect was corporate in character, and consequently the vote of the majority was binding on all. This opinion (as to single towns) met the approval of two of the Maine justices, but Preble, J., distinguished between the wording of the Massachusetts and Maine constitutions and held that in the latter state, the right was individual, and the house of representatives acted in accordance with this dissenting opinion. In 6 Maine, 514, there is an opinion as to the formalities necessary in an election by the two houses acting jointly to supply deficiencies in the senate, and this is approved in 7 Maine, 483. The subject matter of 35 Maine, 563, is similar. The three cases of 1880 deal with the powers of the governor and council as to returns on elections to the legislature.²¹

From the twenty-nine cases reviewed in this section, certain rules may be readily deduced. Under an advisory opinion clause, the justices usually are willing to give advice to either house of the legislature in matters pertaining to (1) the determination of the number of representatives to which a town or district is entitled, (2) the general qualifications of candidates for election to either house (?), (3) the regularity of elections of members to either house. But if the authority of precedent is to prevail, there are several necessary qualifications to these rules. (1') Opinions should not be given upon questions of fact which have been duly determined by the legislative department.²² In extreme cases this may lead to a difficulty,

²¹ Questions Submitted, etc. 70 Me. 560; Statement and Questions Submitted, etc. 70 Me. 570; Statement and Questions Submitted, etc. 70 Me. 600.

²² Opin.s of the Justices, 18 Me. 458. In Opin. of the Justices, 33 Me. 587, the court, assuming the facts as stated in the inquiry, passed upon the competence (a question of law) of an earlier legislature to enact a certain law.

as in 70 Maine, 570, and 70 Maine, 600, where in order to decide which of two legislatures was lawful, the justices had to decide which of two statements of facts was correct. (2') An opinion should not be given to the legislature upon a matter which rests in the discretion of the executive; whether action has been taken or not.²³ These two exceptions are supported by good reasons and are in line with principles announced in advisory opinions on other questions, but there are two alleged exceptions which are questionable. (3') In 95 Maine, 564, a majority (five) of the justices declined to answer a question of law, on the ground that, the legislature having already adjourned, the occasion was not a "solemn" one as to that body, and an opinion for the guidance of a future house would be an unwarrantable interference with its right to be judge of the elections and qualifications of its members. (4') The refusal in 122 Massachusetts, 600, was based on the grounds that the question involved could not be affected by legislation, and might come before the court judicially. The reasoning in these two cases is not founded upon a sound theory of the function of the advisory opinion or a fair construction of the constitutional clause in those States. Each house of the legislature is of course the final judge as to the elections and qualifications of its members, but in arriving at a decision it is entitled to the advice and assistance of the justices of the supreme court on points of law. As this counsel is purely advisory,²⁴ it is difficult to see why an opinion for the guidance of a future legislature is an interference with any of its rights. As the minority in 95 Maine, 564, point out, it may often be necessary and quite

²³ Veto Power—Special Session of General Assembly—9 Colo, 642 Opin. of the Justices, 56 N. H. 570; Opin. of the Justices, 56 N. H. 574.

²⁴ The justices went too far in 7 Me. 483, when they said the decision and proceedings in the senate "will, of course, be in accordance with the constitution, as understood and construed by the court in their opinion delivered in answer to your questions, in connection with their former opinion, respecting the constitutionality of the convention and its proceedings."

practical to obtain opinions beforehand so as to avoid errors, and opinions have, in not a few cases, have given after the adjournment of the interrogating legislature.²⁵ This argument prevailed in 103 Maine, 506, where all the justices but one²⁶ returned opinions to questions received after the legislature adjourned. As to (4') *supra*, the reasons given for refusal to answer seem to involve incorrect statements. The questions referred might well be affected by legislative action, as a constitutional amendment touching the eligibility of the justices mentioned would have to be initiated by the general assembly.²⁷ Also, the question as to eligibility could scarcely come before the court judicially if, through the assistance of the justices, the house of representatives should once pass upon it, since this decision is final.

Among the twenty-nine cases on the composition of the legislature, are three where the inquiry came from the executive department.²⁸ All are in the same State, and are so unsatisfactory as to make generalization undesirable. It must be admitted that the justices were very generous in their answers on these occasions. The questions in 70 Maine, 560, all have to do with executive duties in counting the votes for members of the legislature, and are quite within the advisory opinion provision. But the questions in the other two opinions seem to concern the executive department very little; yet all were answered save two which could only be decided by the senate. These last cases are nearly a century old and quite possibly might not be followed at the present time. The Canadian supreme court has given two opinions on the right of the provinces to representation in the House of Commons.²⁹

²⁵ See list in Minority Opinion in 95 Me. 564.

²⁶ Three were the minority justices of 95 Me. 564.

²⁷ Const. Amendment IX.

²⁸ Opin. of Justices, 6 Me. 514; Opin. of Justices, 7 Me. 483; and Questions Submitted, etc. 70 Me. 560.

²⁹ In the matter of the Representation in the House of Commons, etc.

b. *Organization and Procedure.* There are but three instances of questions concerning the organization of a legislative body. The first is a case of unusual difficulty, which is unique in the reports and probably could not arise again. An extraordinary session of the Florida legislature, summoned in 1868 for a particular purpose, started impeachment proceedings against the governor. The lieutenant-governor claimed to act as governor, but the latter kept possession of the executive offices and asked the supreme court whether the impeachment proceedings were valid, alleging (*inter al.*) the lack of a quorum in the senate. The justices felt bound to reply (under the 1868 form of the Florida clause), but recognized that "to answer this communication is, therefore, *pro tanto*, a recognition of its writer as the Constitutional Governor of Florida—to decline to answer it, is no less than a refusal so to recognize." However, they avoided passing upon the competence of a special session to impeach, by concluding that there was not a quorum in the senate.³⁰ Later a regular session treated the proceedings of the special session as void.³¹ The other two cases on organization deal with the speakership. In 1891, a dispute in the Colorado house of representatives as to the selection of standing committees³² culminated in an ouster of one speaker and the election of another. The governor promptly asked the justices of the supreme court whether a speaker could be summarily removed in that way, basing his right to an answer on the necessity of communicating with the presiding officer of the house, and of passing upon bills with his signature. The justices hesitated to give the governor an opinion upon a "matter exclusively pertaining to the legislative department,"

33 Can. S. C. R. 475; In the matter of the Representation of Prince Edward Island, etc., 33 Can. S. C. R. 594.

³⁰ In the matter of the Executive Communication, etc., 12 Fla. 653.

³¹ Baldwin, *American Judiciary*, p. 49.

³² See HJ. 1891, 15, 27, 114-115.

but concluded the case was within the advisory opinion clause, and declared the speaker had been properly removed.³³ It is not easy to reconcile the opinion just given with the third case.³⁴ There the lieutenant-governor-elect having failed to qualify, his predecessor announced his intention to hold office until a successor should be elected. The senate chose a presiding officer *pro tempore*, and then asked the advice of the supreme court as to the status of the lieutenant-governor. A majority refused to answer for the reason that it would "involve a determination of private rights in an *ex parte* proceeding," and observed that the acts of the lieutenant-governor as an officer *de facto* would unquestionably be valid, and that they were not authorized "to answer questions propounded to the end that solemn occasions may not arise." Of course the first of these reasons did not apply to 15 Colorado 520, but why would the second not have been a good reply to the governor? Or why, if the answer in 15 Colorado, 520, was properly given, is not the dissenting argument of Hill and Scott, JJ., in 54 Colorado, 166, perfectly good, viz., the necessity of knowing whose acts to recognize as the acts of the legal presiding officer made the question important and the occasion solemn, and that it was a "question of grave public concern, compared with which the private right sinks into insignificance."³⁵

The opinions classified as relating to procedure (thirty-two in number) are, for the most part, upon various questions relating to the passage of bills.³⁶ Five of them have to do with the time

³³ In re Speakership of the House of Representatives, 15 Colo. 520.

³⁴ In re Interrogatories of the Senate, 54 Colo. 166.

³⁵ Cf. the Majority Opinion in In re SR. No. 10 Concerning Governorship Contest, 33 Colo. 307, which was *ex parte* as far as the supreme court was concerned.

³⁶ Except Opin. of the Court, 63 N. H., 625, where the house of representatives inquired as to the operation of a statute providing that notice of a petition to the legislature might be submitted before the beginning of a session; and Opin. of Justices, 18 R. I. 824, where the house asked a question as to the power of the senate to adjourn for more than two days.

limit imposed upon the governor in his consideration of bills submitted for approval.³⁷ Six are inquiries as to the majority necessary for action upon certain kinds of bills or clauses or for the repassage of a bill over the governor's veto. In three of these an opinion was refused—not, however, because of the nature of the question. In *In re Construction of Constitution* (3 S. D. 548) and *In re Opinion of the Justices* (208 Mass. 614) the court's principal objection was that the advice was not sought for the benefit of the body making the interrogation. In *In re SB. No. 416* (45 Colo. 394), the only valid objection adduced was that the constitutional expiration of the session in three days did not permit time for a satisfactory consideration of the question.³⁸ In *In re Bounties to Veterans* (186 Mass. 603) the court avoided the question of majority by declaring that the bill was unconstitutional anyway. In the two remaining cases the question was answered without hesitation.³⁹ Then there are fifteen opinions dealing with the form or content of proposed legislation. In three,⁴⁰ bills are disapproved as unconstitutional, because not passed by both houses in the same form. The nature of amendments permitted is passed upon in three cases.⁴¹ In *In re General Appropriation Bill*

³⁷ *Opin. of Justices*, 3 Mass. 567; *Opin. of Justices*, 99 Mass. 636; *Opin. of Justices*, 135 Mass. 594; *Opin.*, 45 N. H. 607; In the matter of Senate Resolution, etc., 9 Colo. 632.

³⁸ The other reason given in this case that legislation was no longer pending after a final vote in both houses does not square with other cases in the same state. Cf. *In re SR. Relating to the Recall of Bills, etc.*, 9 Colo. 630; In the matter of SR., etc., 9 Colo. 632; *In re SR. Relating to SB. No. 45, etc.*, 12 Colo. 339; and *In re HR. Relating to HB. No. 218*, 12 Colo. 359. Surely legislation is not completed within the rule of *In the matter of the Constitutionality of SB. No. 65*, 12 Colo. 466, and *In re HR. No. 25*, 15 Colo. 602, as to existing statutes, while it lacks the executive signature or may be duly repassed over his veto.

³⁹ *In re Emergency Clause*, 18 Colo. 291; *In re SR. No. 9*, 54 Colo. 429.

⁴⁰ *Judicial Opin.*, 35 N. H. 579; *Opin. of the Justices*, 52 N. H., 622; *In re Opin. of the Justices*, 76 N. H. 601.

⁴¹ In the matter of HB. No. 231, 9 Colo. 624; *In re Amendments of Legislative Bills*, 19 Colo. 356; *In re HB. No. 250, etc.*, 26 Colo. 234.

(16 Colo. 539) an opinion is given as to the effect of omitting an emergency clause, and in *In re Advisory Opinion* (43 Fla. 305), an opinion as to the absence of the enacting clause. In the matter of the Executive Communication (14 Fla. 283) and in the matter of the Executive Communication (14 Fla. 285), the governor questioned the constitutionality of laws because they dealt with more than one subject, and the court agreed with him. The same rule is the occasion for an opinion in *In re Constitutionality of an Act* (21 Colo. 46). The opinion of *In re Governor's Proclamation* (19 Colo. 333) covers the scope of legislation permitted to a special session. The questions in the other four (in one of which the opinion is extra-constitutional),⁴² relate to the form or manner of submission of initiated and referred measures; the Colorado court refused to answer as the measures had already been adopted by the people. Finally, there are three opinions containing questions of a miscellaneous character—the power of the legislature to recall a bill from the governor,⁴³ the constitutionality of a senate rule on readings,⁴⁴ and a general question as to the constitutionality of the passage of a certain bill.⁴⁵

It may be taken as settled that the justices will (under an advisory opinion clause in the constitution) give their opinions: (1) To the legislature on questions (a) as to the effect of the governor's acts or omissions regarding bills submitted for his approval, at least when there is doubt as to the necessity for further legislative action; (b) as to whether an exceptional majority is required for certain measures or clauses, at any rate if the information may conceivably be of use in connection

⁴² *In re Opin. of Supreme Court*, 29 R. I. 611; *In re HR. No. 10*, 50 Colo. 71; *In re SR. No. 4*, 54 Colo. 262; *In re Senate File 31*, 25 Nebr. 864.

⁴³ *In re SR. Relating to the Recall of Bills*, 9 Colo. 630.

⁴⁴ In the matter of the Constitutionality of Senate Rule No. — (sic), 9 Colo. 641. The resolution for this opinion was the first business after the governor's message in the legislature of 1887—S.J. 137, 159—so the request is probably the first one made under the advisory opinion amendment.

⁴⁵ *In re HR. No. 30*, 10 S. D., 249.

with a particular bill;⁴⁶ (c) as to the nature of amendments which can constitutionally be proposed in one house to a bill originating in the other. (2) To the executive department, on questions (a) alleging the unconstitutionality of a law on the ground that it did not pass both houses in the same form; (b) as to the effect of the absence of certain clauses of a procedural nature—in either case, semble, whether the information is needed in the exercise of the veto power, or in carrying out the provisions of a completed enactment.

Before leaving this section, it might be worth while to mention the New Jersey statute,⁴⁷ which makes available to the executive department a summary method of securing action by the supreme court upon laws which are possibly void because of procedural defects. An example of a petition under this act may be found in 83 New Jersey Law, 303, where the chief justice declares there is no doubt the legislature could confer such jurisdiction on the supreme court, as the question of constitutionality is always a judicial one, and the people have a right to know "whether a given law which appears upon the statute books is one which they are obligated to obey."⁴⁸

⁴⁶ In re Opin. of the Justices, 208 Mass. 614. Perhaps this is what the court meant in In re SB. No. 416, 45 Colo. 394, but it was not applicable to that case, for the bill there might easily have come before the legislature again upon an executive veto.

⁴⁷ "If, at any time within one year after any law or joint resolution shall have been filed by the Secretary of State, . . . the Governor . . . shall have reason to believe that (it) was not duly passed by both houses of the Legislature, or duly approved as required by the Constitution of this State, he may, in his discretion, direct the Attorney-General to present a petition to the Supreme Court of this State, setting forth the facts and circumstances, and praying that the said law or joint resolution may be decreed to be null and void. . . . The said court shall have jurisdiction and power to proceed in a summary way and inquire into the facts and circumstances alleged; . . . and after a full hearing and consideration, . . . may dismiss the said petition . . . or decree (the law or joint resolution) or any part thereof to be null and void." 1873, Comp. Stat. IV, p. 4978.

⁴⁸ This reasoning would not be approved by the Colorado courts which refuse to pass upon the constitutionality of completed legislation except in regular cases *inter partes*. See p. 197 *infra*.

c. *Financial Powers and Duties of the Legislature.* For the sake of convenience, cases belonging here will be listed under three heads: (i) Taxation, (ii) Appropriations, (iii) Miscellaneous. The number in each class is relatively large and the cases are among the most important that the courts have dealt with in this extra-judicial manner. In Colorado particularly, the history of public finance would be decidedly incomplete without an examination of the advisory opinions connected with that subject. In all the States, the judges have shown a tendency to generosity in answering financial questions, and the few refusals that are recorded (twelve out of a total of eighty-one cases) are for the most part quite reasonable and not because of the subject matter of the question.

(i) *Taxation.* Opinions have been given without objection on such questions as the power of the legislature to tax personality at a different rate from realty,⁴⁹ to tax shares, stocks, credits or other special forms of personality,⁵⁰ to tax incomes generally,⁵¹ to tax inheritances,⁵² to tax residents on land ceded to the United States for military purposes,⁵³ to tax persons living in a particular locality for educational purposes,⁵⁴ to tax sales of corporation shares,⁵⁵ to tax the interest from securities and exempt the securities,⁵⁶ to levy a special tax for road repairing,⁵⁷ to tax towns excluded temporarily from representation,⁵⁸ to tax generally under a school fund act,⁵⁹ to impose a

⁴⁹ In re Opin. of the Justices, 195 Mass. 607; In re Opin. of the Justices, 208 Mass. 616.

⁵⁰ In re Opin. of the Justices. In re Taxation, 220 Mass. 613; In re Opin. of the Justices, 76 N. H. 588.

⁵¹ Opin. of the Justices, 53 N. H. 634.

⁵² In re Inheritance Tax, HB. No. 122, 23 Colo. 492.

⁵³ Opin. of Justices, 1 Metc. 580.

⁵⁴ Opin. of Justices, 5 Metc. 587.

⁵⁵ Opin. of the Justices, 196 Mass. 603.

⁵⁶ In re Opin. of the Justices, 77 N. H. 611.

⁵⁷ An Opin. Delivered by the Court, etc., 4 N. H. 565.

⁵⁸ Opin.s of the Justices, etc., 18 Me. 458.

⁵⁹ Opin.s of the Justices, etc., 68 Me. 582.

different rate of taxation upon unincorporated places from that applied to corporate,⁶⁰ to lay an excise tax on railroads,⁶¹ to levy a deficiency tax,⁶² and to impose a tax on certain lands at the end of a period of constitutional exemption.⁶³ In all these cases⁶⁴ the legislature was the source of interrogation. Similar questions met with refusals in four instances. A Connecticut court declined to advise the legislature as to its power to tax the income from United States bonds, on the constitutionally safe basis that an answer would involve an *ex parte* adjudication of private rights which the judiciary was not authorized to make.⁶⁵ The refusal, in South Dakota,⁶⁶ to deal extra-judicially with the legislative power to tax interstate carriers, after the United States circuit court of appeals had already dealt with the matter in regular proceedings, because the occasion could scarcely be a solemn one when the opinion would be so inconclusive, is quite reasonable, if it is once admitted that the justices are entitled to pass upon the solemnity of occasions.⁶⁷ Perhaps the same may be said of the position of the Massachusetts judges⁶⁸ that the mere possibility that legislation may be introduced upon a particular subject does not make the occasion of a question thereupon a solemn occasion within the meaning of the advisory opinion clause. But it is difficult to justify the refusal of *In re Opinion of the Justices* (76 N. H. 597). There the justices feebly argue that since they cannot agree, in the time available, upon the question of gradation involved in an inheritance tax bill submitted to them, "it is entirely immaterial to which side of the question the major-

⁶⁰ *In re State Taxation*, 97 Me. 595.

⁶¹ *In re Railroad Taxation*, 102 Me. 527.

⁶² *In re Limitation of Taxation*, 3 S. D. 456.

⁶³ *In the matter of the Constitutionality of HB. No. 18, etc.*, 9 Colo. 623.

⁶⁴ Except, of course, *In re Limitation of Taxation*, 3 S. D. 456.

⁶⁵ *Reply of the Judges of the Supreme Court, etc.*, 33 Conn. 586.

⁶⁶ *In re Opin. of the Judges*, 34 S. D. 650.

⁶⁷ See pp. 161-77 *infra*.

⁶⁸ *In re Opin. of the Justices*, 217 Mass. 607.

ity may incline." This can be a valid reason for declining an answer only on the assumption that it is the opinion of the court as a whole that is desired. But Article 73 of Part II in the Constitution of 1902 says "the opinions of the justices of the superior court;" and, as a matter of fact, although individual and dissenting opinions are not as common in New Hampshire as in other States, they are by no means unknown there.⁶⁹ Furthermore, they argue, if the law is passed, the question of constitutionality will be litigated before the court anyway, and the justices ought not to be hampered by previous views. If this argument were admitted as a sufficient reason for a refusal, the usefulness of the advisory opinion in the United States would be reduced to almost nothing, for it would apply to practically all questions regarding the constitutionality of pending legislation. If it had been applied as a test during the past century, the number of advisory opinions in our reports would have been reduced over twenty-five percent. The advantage of obtaining a judicial opinion on the constitutionality of a measure in advance of its enactment is recognized in the practice of all the States where the legislature may request advisory opinions, including New Hampshire itself.⁷⁰ It would have been much better had the judges contented themselves with the perfectly satisfactory answer (which was, apparently, quite consistent with the facts) that the time permitted for consideration was insufficient to admit of a reply.⁷¹

The subject matter of four interrogatories is the power of a legislature to exempt certain kinds of property from taxation

⁶⁹ See *Opin. of the Justices, etc.*, 41 N. H. 553; *Opin.*, 45 N. H. 607; *In re Opin. of Justices*, 74 N. H. 606; and recently *In re Opinion of the Justices*, 77 N. H. 611 (especially the opinion of Peaslee, J.).

⁷⁰ *An Opin. of the Justices, etc.*, 7 N. H. 599; *Opin. of the Justices, etc.*, 25 N. H. 537; *Opin. of Justices*, 44 N. H. 633; *Opin. of the Justices, etc.*, 45 N. H. 595; *In re Opin. of the Justices*, 76 N. H. 588; *In re Opinion of the Justices*, 76 N. H. 609; *In re Opin. of the Justices*, 77 N. H. 611. And see pp. 154-158 *infra*.

⁷¹ See p. 219 *infra*.

or to authorize its exemption.⁷² In the earliest of these a New Hampshire court was again compelled to decline to answer through lack of time for examination, and unfortunately, again tries to make doubtful excuses do the work of sound reasons. The house of representatives asked whether the law authorizing towns to exempt manufacturing property from taxation was a violation of the bill of rights. In their refusal, the judges argued ingeniously that since contracts already made under the law were valid in any case (previous judicial construction having favored constitutionality), and the invalidity of future contracts could be effected by repealing the law, a judicial opinion as to its true construction was unnecessary. But this assumes two premises, that the court could not change its mind as to constitutionality and that the house of representatives is only entitled to ask opinions on points which the court has never passed upon. It is submitted that these premises are not conclusive. The court may be unwilling to overrule a regular case in an advisory opinion,⁷³ but this does not do away with the obligation to tell an authorized inquirer what the state of the law is, whether settled or not. Suppose a legislature does not wish to repeal a statute but is desirous of amending certain clauses if they are unconstitutional, is it not entitled (under an advisory opinion provision) to know the judicial opinion as to the construction of those clauses?

Other opinions relating to taxation cover the method of taxing certain kinds of property,⁷⁴ the necessity of imposing a tax on

⁷² *Opin. of the Court*, 58 N. H., 623; *In re Opin. of the Justices*, 76 N. H. 609; *In re Opin. of the Justices*, 77 N. H. 611; *In re Construction of Revenue Law*, 2 S. D. 58.

⁷³ *In re Bounties to Veterans*, 186 Mass. 603; *Opin. of the Justices*, 196 Mass. 603; *In re Opin. of the Justices. In re Taxation*, 220 Mass. 613; *In re Opin. of the Justices*, 76 N. H. 588; *In re House Resolutions, etc.*, 15 Colo. 598; *In re Assessment of Property, etc.*, 25 Colo. 296; and many other cases.

⁷⁴ *Taxation of National Banks*, 53 Me. 594; *In the matter of the Constitutionality of H.B. No. 270 and S.B. No. 69 and No. 106, etc.*, 9 Colo. 635 (mining claims).

property at the close of a period of constitutional exemption,⁷⁵ the power to authorize towns to lay a special tax,⁷⁶ and the power to sell in default of payment of taxes.⁷⁷ The last two opinions were in response to requests from the governor.

(ii) *Appropriations*. Quite a few questions deal with the power to appropriate money for a particular purpose—for bounties to veterans of the Civil War,⁷⁸ as a pension to a deceased official's widow,⁷⁹ for the development of land to furnish homes to wage-earners,⁸⁰ in aid of a church or religious society or sectarian school or other undertaking,⁸¹ for old age pensions,⁸² to aid unfinished railroads within the State,⁸³ to reimburse county treasurers, for sums paid by them under an act of the legislature,⁸⁴ for the relief of destitute farmers after years of severe drouth,⁸⁵ to cover failure by counties to pay the expenses of

⁷⁵ In the matter of House Resolution, etc., 9 Colo. 622.

⁷⁶ In re Abolishing School Districts, 27 R. I. 598.

⁷⁷ Advisory Constitutional Opin. of the Judges, etc., 37 Mo. 129.

⁷⁸ In re Bounties to Veterans, 186 Mass. 603; In re Opin. of the Justices, 190 Mass. 611; In re Opin. of the Justices, 211 Mass. 608. In the first of this interesting series, the justices declared the appropriation would be unconstitutional, not being for public purposes. Again, in the second, the justices felt bound to adhere to the settled law of the State but hinted that an appropriation might be permitted, to recognize the valuable services of persons serving in the Civil War, to be paid to them or to buy medals, if the dignity of the state would be enhanced or patriotism promoted thereby. And when the third inquiry alleged that the purpose of the appropriation was to "promote patriotism" and the public good, a majority of the justices declared, "We are bound to take as true the purposes declared in the proposed act as those, and those only, which the Legislature had in view in its enactment;" though Rugg, C. J., insisted that the assertion of a patriotic purpose did not change the essence of the bill at all, and that the reasoning in 190 Massachusetts, 611, should apply.

⁷⁹ In re Opin. of the Justices, 175 Mass. 599.

⁸⁰ In re Opin. of the Justices, 211 Mass. 624.

⁸¹ In re Opin. of the Justices, 214 Mass. 599.

⁸² In re Opin. of the Justices, 100 Atl. 49 (N. H.).

⁸³ In the matter of the Executive Communication, 13 Fla. 699.

⁸⁴ In re Bounties, 18 Colo. 273.

⁸⁵ In re Relief Bills, 21 Colo. 62.

girls committed to the State Home for Girls,⁸⁶ for payment of a stenographer in the attorney-general's office.⁸⁷ There are four Colorado opinions⁸⁸ on the power of the legislature to make appropriations from the internal improvement fund. Another Colorado case⁸⁹ merits special attention because of its influence upon the financial policy of the State. The seventh general assembly heaped up appropriations far in excess of the revenue which could be provided under the constitution. A request from Governor Cooper for a criterion to test the legality of any particular appropriation, elicited from the supreme court a clear though guarded statement of the general principles that should govern the legislature in making its appropriations. The judges declared that the excess appropriations were absolutely void, and the constitution provided no method of relief. Appropriations for the expenses of the government were to be preferred to all other appropriations, regardless of date or emergency clause, but questions of priority among other appropriations would have to be determined in regular judicial proceedings. This opinion is unquestionably the constitutional law of Colorado. In his message to the next legislature, Governor Cooper called their attention to the fact that there were appropriations on the statute books which were not available and asked for their repeal.⁹⁰ His successor, Gov. Routt, declared \$600,000

⁸⁶ In re Constitutionality of SB. No. 196, 23 Colo. 508.

⁸⁷ In re Appropriations for Deputies, etc., 25 Nebr. 662.

⁸⁸ In re Senate Resolution Relating to Internal Improvement Fund, 12 Colo. 285; In re Senate Resolution Relating to Appropriation, etc., 12 Colo. 287; In re Internal Improvements, 18 Colo. 317; and In re Internal Improvement Fund, 24 Colo. 247.

⁸⁹ In re Appropriations by General Assembly, 13 Colo. 316.

⁹⁰ "After the decision of the supreme court, in answer to questions submitted to them from my office, in September, 1889, the officers of State were compelled to declare certain appropriations made by the Seventh General Assembly unavailable: Thus, there stand upon our statute books certain acts authorizing expenditures of money for purposes, more or less desirable, but with no fund available to carry out the acts. . . . I recommend the repeal of all acts of appropriation authorizing the expenditure of

of state warrants had been taken up by the school fund (supposedly inviolate!) and other investment funds, and asked that the warrants be validated and provision made for their payment from surplus revenue.⁹¹ Appropriations by the next assembly were within the constitutional limit,⁹² and in 1895, Hayt, C. J., could say⁹³ that excess appropriations had gradually decreased since the opinion we are considering. However, the twelfth general assembly enacted excess appropriations to the extent of nearly \$500,000, and Governor Thomas reminded the next assembly that they were void according to the opinion of the supreme court.⁹⁴ Governor Peabody also accepted the opinion as final, in 1903.⁹⁵

Answers have been given, too, to questions as to the power of the governor to recommend appropriation items,⁹⁶ the power

moneys beyond the estimated revenues of the State. In fact, in this line, I urge the repeal of all laws for appropriations not absolutely necessary for the government of State affairs and the advancement of the interest of the people." SJ. 1891, p. 58.

⁹¹ See SJ. 1891, pp. 103-4.

⁹² See Gov. Routt's Message of January 7, 1893, SJ., pp. 46-7, and Gov. Waite's Inaugural, *ibid.*, p. 131.

⁹³ "These cases . . . are a part of the litigation which springs from the custom of the legislature, at each biennial session, to appropriate money in excess of the revenues of the state, in violation of express constitutional mandates. . . . This practice . . . has led to expensive and vexatious litigation, to the impairment of the credit of the state, resulting not infrequently in the deprivation of some of our most deserving institutions of funds absolutely necessary. . . . To the credit of the legislature, be it said, however, that such unconstitutional appropriations have gradually decreased in amount during the six years that have elapsed since the first opinion of this court was rendered upon the subject, which is entitled *In re Appropriations*, 13 Colo. 316. . . . The leading opinion in this state in reference to the subject was written in the case in 13 Colo. already referred to. . . . These principles have been followed and approved in a number of cases." *Parks v. Soldiers' and Sailors' Home*, 22 Colo. 86, at p. 90.

⁹⁴ SJ. 1901, p. 21.

⁹⁵ HJ. 1903, p. 102.

⁹⁶ *In re Opin. of the Justices*, 208 Mass. 610.

of the legislature to make comptroller's warrants or treasurer's certificates receivable for State dues,⁹⁷ the power of the legislature to appropriate from assessed but not yet collected revenues,⁹⁸ the necessity for specific appropriations where continuing appropriations have been provided for,⁹⁹ and as to the nature of an appropriation for a Tax Commission.¹⁰⁰

There are three refusals to record. A Florida court declined to answer a question from the governor as to his obligation to deed certain land to a town and sign a warrant in its favor under an act of the legislature, on the ground that the question did not involve executive rights or duties under the constitution.¹⁰¹ In the second case,¹⁰² a Colorado governor asked the court its opinion as to the priority of legislative appropriations, and the court quite reasonably pointed out that, since a test case was then pending in a district court, private interests were involved and the *ex parte* enunciation of any general rule would be undesirable.¹⁰³ Finally the supreme court of the same State has refused to give an opinion¹⁰⁴ as to the constitutionality of possible appropriations for a bureau of child and animal protection, because the inquiry was not connected with pending legislation and involved the construction of existing statutes.¹⁰⁴

(iii) *Miscellaneous*. The cases relegated to this subdivision cover quite a variety of matters—legislative power to remit tolls which were partial security for a bond issue,¹⁰⁵ to impose upon a city a debt greater than it could constitutionally as-

⁹⁷ In the matter of the Executive Communication, etc., 14 Fla. 283.

⁹⁸ In re State Warrants, 6 S. D. 518.

⁹⁹ In re Continuing Appropriations, 18 Colo. 192.

¹⁰⁰ In re Questions of the Governor, 55 Colo. 17.

¹⁰¹ Advisory Opinion to Governor, 50 Fla. 169.

¹⁰² In re Priority of Legislative Appropriations, 19 Colo. 58.

¹⁰³ Cf. In re Appropriations by General Assembly, 13 Colo. 316.

¹⁰⁴ In re Interrogatories of the House, 162 Pac. 1144 (Colo.).

¹⁰⁵ In re Opin. of the Justices, 190 Mass. 605.

sume,¹⁰⁶ to assume the bounty debts of cities and towns,¹⁰⁷ to authorize a board of public works to spend city funds upon improvements,¹⁰⁸ to control the deposit of State funds,¹⁰⁹ to authorize a loan from the school fund,¹¹⁰ to determine damages caused to private property by the State.¹¹¹ In eight instances the questions relate to the power of the legislature to authorize a bond issue for certain purposes,¹¹² or the making of municipal loans to assist private enterprises,¹¹³ or the issuance of warrants of indebtedness.¹¹⁴ One stray question calls for a definition of the fiscal year.¹¹⁵ Three interesting opinions have to do with the relative position of the two houses in financial matters—the power of the senate to determine the proportion of ratable property in towns,¹¹⁶ to originate appropriations,¹¹⁷ and to originate appropriations or bills authorizing exemption from taxation.¹¹⁸ Two Colorado cases deal with the power of the legislature to apportion the debts of old counties when new counties are created therefrom.¹¹⁹ A Missouri court informed the governor that an act of the legislature releasing a first lien of the State upon a particular railroad was constitutional,¹²⁰ but seven years later a differently constituted court refused

¹⁰⁶ In re Opin. of the Justices, 99 Me. 515.

¹⁰⁷ Opin. of the Justices, 53 Me. 587.

¹⁰⁸ In re SB. Providing for a Board of Public Works, etc., 12 Colo. 188.

¹⁰⁹ In re HR. Relating to HB. No. 349, 12 Colo. 395.

¹¹⁰ In re Loan of School Fund, 18 Colo. 195.

¹¹¹ In re Constitutionality of Substitute for SB. No. 83, 21 Colo. 69.

¹¹² In re State Bonds, 81 Me. 602; In re Opin. of the Justices, 34 R. I. 191; In re HB. No. 165, 15 Colo. 593, 595; In re Casual Deficiency, 21 Colo. 403; In re State Bonds, 7 S. D. 42; In re House Roll 284, 31 Nebr. 505.

¹¹³ Opin. of the Justices, 58 Me. 590.

¹¹⁴ In re Canal Certificates, 19 Colo. 63.

¹¹⁵ In re HR. No. 25, 15 Colo. 602.

¹¹⁶ Opin. of the Justices, 126 Mass. 547.

¹¹⁷ Opin. of the Justices, 126 Mass. 557.

¹¹⁸ Opin. of the Justices, 70 N. H. 642.

¹¹⁹ In the matter of HB. No. 231, 9 Colo. 624; In the matter of the Constitutionality of Section 9 of HB. No. 122, 9 Colo. 639.

¹²⁰ Advisory Constitutional Opin. of the Judges, etc., 37 Mo. 139.

the senate an answer to the same question (though relating to a different act), for the reason that "the matters referred to concern the property rights of the State and the vested rights of individuals and corporations, and are such as are liable at any time to be brought before the courts in real controversies for adjudication."¹²¹ Practically the same court declined, the following year, to give an opinion to the house of representatives upon a bill giving a railroad more time to repay a loan from the State, for the same reason.¹²² Finally there are two refusals in Colorado, besides the one noted above (In re Priority of Legislative Appropriations, 19 Colo. 58). In In re University Fund, 18 Colorado, 398, the senate asked whether the general assembly could constitutionally create a University Land Permanent Fund from certain sources or give the Board of Regents exclusive control of certain proceeds from sales of land, and the court declined to answer because the question involved the constitutionality of existing statutes,¹²³ though it went on to say that the provisions of the bill submitted did not seem to contravene any clause of the constitution. And In In re Assessment of Property by the State Board of Equalization, 25 Colorado 296, the governor asked (*inter alia*) whether the legislature could constitutionally authorize a board of equalization to assess railroads, and the court felt "constrained to withhold" any opinion, for the very good reason, that a case involving the same subject matter was at that time before the court.

Summary. There is such unanimity on the part of the courts in dealing with questions concerning the financial powers and duties of the legislature, that generalization can be quite succinct. Such questions are, it would seem, *ex sua natura*,

¹²¹ In the matter of the N. Mo. R. R., 51 Mo. 586.

¹²² Opin. of the Court in Response to the Resolution of the General Assembly, etc., 55 Mo. 497.

¹²³ For the validity of this rule see pp. 193-202 *infra*.

"important questions," and will be answered unhesitatingly, whether put by the legislature itself or by the governor. As a matter of course, the subject matter is, in most cases, questions of taxation or appropriation, but there is a sufficient diversity in the twenty-two miscellaneous cases reviewed (where answers were given) to indicate that all questions of a financial nature will be favorably received, and, unless they fall within the reasons for disapproval pointed out in a later chapter,¹²⁴ readily answered.

d. *Police Power of the Legislature.* There has been no attempt to bring within this section all the cases where questions were raised which involved the police power. For instance, some of the questions in the section on Labor¹²⁵ might have been listed here, had it not seemed preferable to let subject matter rather than juridical aspect determine their classification. So only the police power cases of a nondescript character having little in common with the other sections of this chapter will be found here. They are few in number and so dissimilar *inter se* as to discourage any effort at generalization. It may be observed, however, that there are but two refusals to answer out of fifteen cases, and only one of them because of the inherent nature of the inquiry.

The opinions given treat of the power of the legislature to regulate patents and the rights of patentees,¹²⁶ to exclude girls from Chinese restaurants,¹²⁷ to prohibit gift enterprises,¹²⁸ to control the sale of convict goods,¹²⁹ to control price discriminations in restraint of trade, and monopolies,¹³⁰ to enact anti-

¹²⁴ See pp. 161-237 *infra*.

¹²⁵ See pp. 123-125 *infra*.

¹²⁶ In re Opin. of the Justices, 193 Mass. 605.

¹²⁷ In re Opin. of the Justices, 207 Mass. 601.

¹²⁸ In re Opin. of the Justices, 208 Mass. 607; In re Opin. of the Justices, 115 N. E. 978 (Mass.).

¹²⁹ In re Opin. of the Justices, 211 Mass. 605.

¹³⁰ In re Opin. of the Justices, 211 Mass. 620.

saloon laws,¹³¹ to standardize fire insurance policies,¹³² and to regulate the weighing of coal.¹³³ In four instances there are opinions upon the power to authorize cities to manufacture gas and electricity,¹³⁴ run fuel yards for the benefit of their citizens,¹³⁵ or establish municipal factories.¹³⁶ One refusal was occasioned by a request from the New Hampshire governor as to the power of the legislature to amend corporation charters by increasing the number of trustees.¹³⁷ Essentially this called for an opinion on the constitutionality of the well-known act amending the Dartmouth College charter, which had been passed five months earlier, and the judges not unreasonably objected to dealing extra-judicially with private rights which had already accrued and would in all likelihood come before them judicially.¹³⁸ But in the other instance where an opinion was refused,¹³⁹ no private rights had as yet come into existence, for it appears from the discussion by the court that the bill (to increase the capital stock of a corporation, enlarge its powers, etc.) was then pending in the legislature. The judges were altogether too narrow in their construction of the advisory opinion clause,¹⁴⁰ and the case should not be looked upon as establishing a precedent.¹⁴¹

¹³¹ Opin. of the Justices, etc., 25 N. H. 537.

¹³² In re Opin. of Justices, 97 Me. 590.

¹³³ In re HB. No. 10, etc., 15 Colo. 600.

¹³⁴ In re Public Lighting, 150 Mass. 592.

¹³⁵ Opin. of the Justices. In re HB. No. 519, 155 Mass. 598; In re Municipal Fuel Plants, 182 Mass. 605.

¹³⁶ Opin. of the Justices, 58 Me. 590.

¹³⁷ Opin. of the Court, 62 N. H. 704.

¹³⁸ As to the validity of such an excuse see pp. 181-202 *infra*.

¹³⁹ Advisory Constitutional Opin. of the Judges, etc., 37 Mo. 135.

¹⁴⁰ See pp. 44-46 *supra* and pp. 181-202 *infra*.

¹⁴¹ A resolution was adopted in the Senate of Minnesota in 1863 (S.J. 1863, p. 54) asking the supreme court if the legislature could by special act create private corporations or confer certain special privileges upon individuals. There is no record of a reply in the journal or in the supreme court reports for 1863.

It might be added that the Canadian supreme court has on five occasions given opinions on questions involving the police power—In re Provincial Jurisdiction to Pass Prohibitory Liquor Laws (24 Can. S. C. R. 170), In the matter of the Jurisdiction of a Province to Legislate Respecting Abstention from Labor on Sunday (35 Can. S. C. R. 581), In re International and Inter-provincial Ferries (36 Can. S. C. R. 206), In re References by the Governor-General in Council (43 Can. S. C. R. 536), and In the matter of Jurisdiction over Provincial Fisheries (26 Can. S. C. R. 444).

e. *Eminent Domain*. Only eight opinions where the right of eminent domain was involved have come to light. All but one are due to interrogatories from the legislature. In the light of advisory opinion theory, they are of little interest. They include questions as to the power of a legislature to authorize a city to take land for broadening streets or for warehouse sites,¹⁴² to authorize a city to build bridges across streets, making compensation to abutting owners,¹⁴³ to authorize a commission to obtain and develop land for workingmen's homes,¹⁴⁴ to regulate the destruction of forests by owners in the public interest,¹⁴⁵ to authorize a commission to obtain land for public parks,¹⁴⁶ and to compel street improvements at the expense of abutting owners.¹⁴⁷

f. *Education*. Ten opinions (including one that is extra-constitutional) have to do with matters touching education or the educational system. They are even more barren of

¹⁴² In re Opin. of the Justices, 204 Mass. 607; In re Opin. of the Justices, 204 Mass. 616.

¹⁴³ In re Opin. of the Justices, 208 Mass. 603; In re Opin. of Justices to Senate, 208 Mass. 625.

¹⁴⁴ In re Opin. of the Justices, 211 Mass. 624.

¹⁴⁵ In re Opin. of the Justices, 103 Me. 506.

¹⁴⁶ In re Opin. of the Justices, 34 R. I. 191.

¹⁴⁷ In re House Resolutions Concerning Street Improvements, 15 Colo. 598.

theoretical interest than those in the preceding section, but are listed for the sake of completeness. Four were prompted by executive inquiries. The questions answered are as follows: the right of residents on land ceded to the United States for military purposes to use the common schools of the State,¹⁴⁸ the meaning of school district in a certain appropriation act,¹⁴⁹ the liability of school districts abolished by law for previous debts,¹⁵⁰ the power to change the location of educational institutions or to consolidate them,¹⁵¹ the power of the legislature to authorize loans from the Permanent School Fund,¹⁵² the power to establish kindergartens in the public school system,¹⁵³ the power to consolidate school districts,¹⁵⁴ the tenure of school boards,¹⁵⁵ and the power of the executive to invest the permanent school fund.¹⁵⁶ The refusal in *In re University Fund*, 18 Colorado 398, to advise upon the power of the legislature to give university regents the exclusive control of certain funds, was based upon the familiar excuse¹⁵⁷ that the question involved the construction of existing statutes.

g. Labor. The eleven cases which fall within the scope of this heading come from only two States, Massachusetts and Colorado. Nine of the references fell upon good soil, five in Massachusetts: the power to compel weekly payment of wages generally,¹⁵⁸ to establish an eight hour day for public employees,¹⁵⁹

¹⁴⁸ Opin. of the Justices, 1 Metc. 580.

¹⁴⁹ *In re Opin. of the Justices*, 75 N. H. 622.

¹⁵⁰ *In re Abolishing School Districts*, 27 R. I. 598.

¹⁵¹ In the matter of Senate Resolutions, etc., 9 Colo. 626.

¹⁵² *In re Loan of School Fund*, 18 Colo. 195.

¹⁵³ *In re Kindergarten Schools*, 18 Colo. 234.

¹⁵⁴ *In re Annexation and Consolidation of School Districts*, SB. No. 9, 26 Colo. 136.

¹⁵⁵ *In re Construction of School Law*, Ch. 9, s. 7, 2. S. D. 71.

¹⁵⁶ *In re School Fund*, 15 Nebr. 684.

¹⁵⁷ See pp. 193-202 *infra*.

¹⁵⁸ *In re HB. No. 1230*, 163 Mass. 589.

¹⁵⁹ *In re Opin. of Justices*, 208 Mass. 619.

to enact a pending workmen's compensation act,¹⁶⁰ to exempt labor unions and the members thereof from certain tortious liability,¹⁶¹ and to limit the right of railroads to discharge employees,¹⁶² and four in Colorado: the power to enact a compulsory arbitration law,¹⁶³ to interfere with the freedom to contract for wages,¹⁶⁴ to establish an eight hour day for certain classes of laborers,¹⁶⁵ and to abolish the use of scrip in the payment of wages.¹⁶⁶ But two of the judges in the latter State, Campbell and Goddard, JJ., felt they had gone too far under the leadership of Hayt, C. J., and refused point blank to answer questions in no essential respect dissimilar to those which have just been mentioned—i.e. as to the constitutional authority of the legislature to abolish payment of laborers in anything but lawful money of the United States.¹⁶⁷ These questions, they said, were not important questions *publici juris* and so came within the rule of 12 Colorado, 466; furthermore answers might affect private rights if the bill should be enacted into law. They admitted a departure from these tests in *In re Bill—to Abolish the Use of Scrip*, 23 Colorado, 504, and in another case, but condemned the course there followed. Although a consideration of the validity of these excuses may better be deferred (see pp. 182-205 *infra*), it may be said at this place that if they had been applied strictly in Massachusetts and Colorado, the eleven opinions of this section would all be labeled refusals, and scores of other cases as well.

The Canadian reports disclose three opinions of the supreme court in cases involving labor questions: *Union Colliery Com-*

¹⁶⁰ *In re Opin. of Justices*, 209 Mass. 607.

¹⁶¹ *In re Opin. of the Justices*, 211 Mass. 618.

¹⁶² *In re Opin. of the Justices*, 220 Mass. 627.

¹⁶³ *In the matter of a Bill for an Act, etc.*, 9 Colo. 629.

¹⁶⁴ *In re HB. No. 203*, 21 Colo. 27.

¹⁶⁵ *In re a Bill Providing that Eight Hours Shall Constitute a Day's Labor*, 21 Colo. 29.

¹⁶⁶ *In re Bill—to Abolish the Use of Scrip, etc.*, 23 Colo. 504.

¹⁶⁷ *In re HB. No. 99, etc.*, 26 Colo. 140; and *In re SB. No. 27, etc.*, 28 Colo. 359.

pany of British Columbia v. Attorney-General of British Columbia, et al., 27 Can. S. C. R. 637, (an appeal from a reference to the supreme court of British Columbia regarding the Coal Mines Regulation Act), In the matter of the Jurisdiction of a Province to Legislate Respecting Abstention from Labor on Sunday, 35 Can. S. C. R. 581, and In re Railway Act Amendment 1904, 36 Can. S. C. R. 136, (the power to regulate the liability of railroads for injuries to employees).

h. *Miscellaneous Questions as to Legislative Power.* It has been found necessary to refer thirty-eight cases to this heterogeneous group, as not coming under any of the preceding sections. Three of these are extra-constitutional cases from Maine, New York and Ohio. The reaction of the judges has been favorable with respect to the following questions: the power of the legislature to fill vacancies in the executive council,¹⁶⁸ to commute punishments after sentence has been given,¹⁶⁹ to exempt certain classes from militia service,¹⁷⁰ to make certain classes eligible to enroll in the militia,¹⁷¹ to change town or county lines,¹⁷² to abolish the probate and insolvency register and give his duties to another officer,¹⁷³ to create a civil service commission with certain powers,¹⁷⁴ to authorize the establishment of new ward lines before a particular census,¹⁷⁵ to authorize the appointment of women as notaries public,¹⁷⁶ to change

¹⁶⁸ Opin. of the Justices, 14 Mass. 470.

¹⁶⁹ Opin. of the Justices, 14 Mass. 472.

¹⁷⁰ Opin. of the Justices, 22 Pick. 571.

¹⁷¹ Opin. of the Justices, 14 Gray, 614.

¹⁷² Opin. of the Justices, 6 Cush. 578; and In the matter of the Executive Communication, etc., 14 Fla. 320.

¹⁷³ Opin. of the Justices, 117 Mass. 603.

¹⁷⁴ Opin. of the Justices, 138 Mass. 601.

¹⁷⁵ Opin. of the Justices, 157 Mass. 595.

¹⁷⁶ In re Opin. of the Justices, 165 Mass. 599; In re Opin. of the Justices, 99 Atl. 999 (N.H.); Opin.s of the Justices, etc., 62 Me. 596 (question re appointment of women as justices of the peace); and In the matter of HB. No. 166, 9 Colo. 628.

the census date within an appointed year,¹⁷⁷ to authorize a guardian to convey the realty of his ward,¹⁷⁸ to provide for recording deeds with town clerks,¹⁷⁹ to elect a United States Senator for a particular term,¹⁸⁰ to direct insane asylum trustees to convey land to the State,¹⁸¹ to grant divorces,¹⁸² to pass the so-called "Personal Liberty Laws,"¹⁸³ to annul a judgment of the supreme court,¹⁸⁴ to call a constitutional convention or submit to the people the question of its desirability,¹⁸⁵ to order a new election in case of failure to elect a United States representative,¹⁸⁶ to consolidate municipalities,¹⁸⁷ to decide contests for the governorship,¹⁸⁸ or for any executive office,¹⁸⁹ to provide a special apportionment of delegates for a constitutional convention,¹⁹⁰ and the duty of the legislature to provide for a census.¹⁹¹ In 1878 several towns asked the State of Maine for the repayment of certain sums paid out by them as bounties; a resolution was introduced in the legislature in favor of the towns, and finally the whole matter was referred to three justices of the supreme court, as a *commission*, to determine questions of law and fact. The justices obligingly complied with the request.¹⁹²

¹⁷⁷ In re Opin. of the Justices. In re Census, 220 Mass. 609.

¹⁷⁸ An Opin. Delivered by the Court, etc., 4 N. H. 565.

¹⁷⁹ An Opin. of the Justices, etc., 7 N. H. 599.

¹⁸⁰ Opin. of the Court, 60 N. H. 585.

¹⁸¹ Opin. of Justices, 70 N. H. 638.

¹⁸² Opin. of the Justices, 16 Me. 479.

¹⁸³ Opin.s of the Justices, etc., 46 Me. 561.

¹⁸⁴ Opin. of the Supreme Court, 3 R. I. 299.

¹⁸⁵ In re the Constitutional Convention, 14 R. I. 649.

¹⁸⁶ In re the Congressional Election, 15 R. I. 624.

¹⁸⁷ In re Extension of Boundaries of the City of Denver, 18 Colo. 288; and In re Constitutionality of SB. No. 293, 21 Colo. 38.

¹⁸⁸ In re Senate Resolution No. 10, etc., 33 Colo. 307.

¹⁸⁹ In re Quære of the Procedure of the Two Houses, etc., 31 Nebr. 262.

¹⁹⁰ Deb. Mass. Conv. 1853, I, 138.

¹⁹¹ In re State Census, 6 S. D. 540.

¹⁹² Opin.s of the Justices, etc., 69 Me. 585.

On the other hand opinions have been refused outright in six cases. When the governor of Florida asked for advice as to the general scope of legislation permitted to the current session of the legislature, that he might know what bills could properly be submitted for his approval, he was promptly told that the exercise of the veto was not an executive but a legislative act and therefore his question did not come within the advisory opinion clause of the constitution.¹⁹³ Four times the Colorado justices have declined to answer, when references were made relating to the general construction of constitutional clauses on irrigation and the power of the legislature thereunder,¹⁹⁴ the constitutionality of a pending act,¹⁹⁵ the constitutionality of a bill submitting an amendment,¹⁹⁶ and the power to repeal a law submitting an amendment.¹⁹⁷ In all of these cases the justices objected that the questions as put were too general—an objection well within the practice in this State.¹⁹⁸ In the first of these they also quite properly called attention to the fact that cases involving these questions were then awaiting adjudication; and in the last two they reiterated another common Colorado rule, that advice will not be given to the assembly on pending legislation “unless, among other things, it is shown that the same has at least passed the committee of the whole.”¹⁹⁹ In the Ohio case (a question of legislative power over municipalities) the court rested its refusal upon the want of constitutional authority to give extra-judicial advice.²⁰⁰ In two instances, answers to some of the questions submitted (upon the power of the legislature to appoint officers otherwise than as

¹⁹³ In re Executive Communication, etc., 23 Fla. 297.

¹⁹⁴ In the matter of Senate Resolution on the Subject of Irrigation, 9 Colo. 620.

¹⁹⁵ In re HB. No. 107, 21 Colo. 32.

¹⁹⁶ In re HB. No. 495, etc., 26 Colo. 182.

¹⁹⁷ In re SR. No. 7, 29 Colo. 350.

¹⁹⁸ See pp. 215-17 *infra*.

¹⁹⁹ In re SR. No. 7, 29 Colo. 350. And see pp. 212 *infra*.

²⁰⁰ State v. Baughman, 38 Ohio St., 455.

provided in the constitution,²⁰¹ and upon the validity of certain impeachment proceedings²⁰²), were made unnecessary by the replies to previous questions in the same reference.²⁰³

2. *The Executive Department*

a. *Composition and Organization.* In nearly half of the twenty-seven cases classed here, the subject matter is the tenure of office of members of the executive department—of the executive council,²⁰⁴ commissioners of pilots,²⁰⁵ the adjutant general,²⁰⁶ certain officers of the militia,²⁰⁷ the register of probate,²⁰⁸ the register of deeds,²⁰⁹ the governor and other officers,²¹⁰ certain appointed officers,²¹¹ county treasurers,²¹² and the board of capitol commissioners.²¹³ Seven deal with eligibility—to appointment on a railroad commission,²¹⁴ or as land agent,²¹⁵ of militia officers to hold a second office,²¹⁶ of members of a Secession convention to hold any State office,²¹⁷ and of women to serve as notaries public.²¹⁸ The other questions are miscellaneous in character: the method of election of the executive

²⁰¹ Opin. of the Justices, 136 Mass. 578.

²⁰² In the matter of the Executive Communication, etc., 12 Fla. 653.

²⁰³ There is a Canadian case dealing with the power of the legislature to pass a law relating to bigamy. In the matter of the Criminal Code, etc., 27 Can. S. C. R. 461.

²⁰⁴ Opin. of the Justices, 3 Gray, 601.

²⁰⁵ Opin. of the Justices, 154 Mass. 603.

²⁰⁶ In re Opin. of the Justices, 216 Mass. 605.

²⁰⁷ Opin. of the Justices, 62 N. H. 706; Opin. of the Justices, 2 Me. 439.

²⁰⁸ Opin. of the Justices, etc., 61 Me. 601.

²⁰⁹ Opin. of the Justices, etc., 64 Me. 596.

²¹⁰ Statement and Questions Submitted, etc., 70 Me. 570.

²¹¹ In the matter of the Executive Communication, etc., 14 Fla. 277.

²¹² In the matter of HB. No. 38, etc., 9 Colo. 631.

²¹³ In re Board of Capitol Commissioners, 18 Colo. 220.

²¹⁴ In re Opin. of the Justices, 75 N. H. 613.

²¹⁵ Opin. of the Justices, 3 Me. 481.

²¹⁶ Opin. of the Judges, etc., 4 R. I. 585.

²¹⁷ In the matter of the Executive Communication, etc., 12 Fla. 651.

²¹⁸ In re Opin. of the Justices, 165 Mass. 599; Opin.s of the Justices, etc., 62 Me. 596; and In the matter of HB. No. 166, 9 Colo. 628.

council,²¹⁹ the successor to the duties of sheriff upon the latter's death,²²⁰ the necessity for the cooperation of the governor and council in approving an appointment by hospital trustees,²²¹ the successor to the acting governorship when the president of the senate ceases to act at the end of a political year,²²² the procedure in governorship contests,²²³ or in contests for any executive office.²²⁴ On the other hand, there have been two refusals to answer inquiries concerning the tenure of various officials—certain appointees of the governor,²²⁵ and the regents of education.²²⁶ In both cases the courts advanced the excuse that any reply would compel an *ex parte* examination of private rights. However reasonable this excuse may be, an examination of the above cases on tenure will show that it has not controlled the earlier practice in Massachusetts, New Hampshire, Maine, Florida, or Colorado itself. Again, in a quite recent case, the Massachusetts court declined to answer questions concerning the general relations of the governor and council in that state,²²⁷ on the ground that, as it did not appear that assistance was necessary in the performance of a pending duty, the question was not an "important question" within the constitution.²²⁸

b. *Financial Administration.* Twenty-seven opinions in all have to do with the financial powers and duties of the governor or some other executive officer. In eight instances answers were given to questions as to the administration of appropria-

²¹⁹ Opin. of the Justices, 3 Gray, 601.

²²⁰ Opin. of the Justices, 126 Mass. 603.

²²¹ In re Opin. of the Justices, 211 Mass. 632.

²²² Opin. of the Justices, 6 Me. 506.

²²³ In re SR. No. 10, etc., 33 Colo. 307.

²²⁴ In re Quære of the Procedure of the Two Houses, etc., 31 Nebr. 262.

²²⁵ In re Appointments by the Governor, etc., 21 Colo. 14.

²²⁶ In re Ch. 6, Session Laws of 1890, 8 S. D. 274.

²²⁷ In re Opin. of the Justices, 211 Mass. 630.

²²⁸ In re Opin. of the Justices, 211 Mass. 632, is the sequel to this refusal.

tions in general,²²⁹ or of appropriations or funds for some special purpose—a special school fund,²³⁰ the appropriation for the maintenance of indigent persons,²³¹ the appropriation for the salary or mileage of members of the legislature,²³² and the general school fund.²³³ Five are concerned with the issuing or payment of bonds, warrants or certificates of indebtedness,²³⁴ and two with the operation of a defective appropriation bill.²³⁵ Advice was also given upon six questions of a miscellaneous nature—the power of the governor to suggest appropriation items to the legislature,²³⁶ or to pledge the State's credit,²³⁷ his duties in administering lotteries,²³⁸ the liability of the treasurer for State funds,²³⁹ and the power of the board of equalization to levy special taxes,²⁴⁰ or to make original assessments.²⁴¹ Six refusals must be recorded. Three are in Florida, where the court applied its prohibition against the construction of statutes to questions upon the governor's powers and duties in administering certain special appropriations,²⁴² or the school

²²⁹ Opin. of the Justices, 13 Allen, 593; *In re Appropriations by General Assembly*, 13 Colo. 316.

²³⁰ *In re Opin. of the Justices*, 75 N. H. 622.

²³¹ Opin.s of the Judges, etc., 4 R. I., 587; Opin.s of the Judges, etc., 4 R. I. 588.

²³² *In re Opin. to Governor*, 35 R. I. 166; *In the matter of the Executive Communication*, etc., 12 Fla. 689.

²³³ *In re School Fund*, 15 Nebr. 684.

²³⁴ Opin. of the Court, etc., 49 Mo. 216; *In re Certificates of Indebtedness*, 18 Colo. 566; *In re Contracting of State Debt by Loan*, 21 Colo. 399; *In re State Warrants*, 6 S. D. 518; and *In re State Bonds*, 7 S. D. 42.

²³⁵ *In re Advisory Opinion*, 43 Fla. 305; and *In re General Appropriation Bill*, 16 Colo. 539.

²³⁶ *In re Opin. of the Justices*, 208 Mass. 610.

²³⁷ *In re Opin. of the Justices*, 76 N. H. 601.

²³⁸ Opin. of the Justices, 7 Me. 502.

²³⁹ *In re HR. Relating to HB. No. 349*, 12 Colo. 395.

²⁴⁰ *In re State Board of Equalization*, 24 Colo. 446.

²⁴¹ *In re Questions of the Governor*, 55 Colo. 17.

²⁴² *In re Opin. of Justices*, 54 Fla. 136.

fund,²⁴³ and in countersigning warrants for State printing.²⁴⁴ The three Colorado refusals are referable to the same excuse although the wording is somewhat different, the fact being emphasized that it would involve an *ex parte* determination of private rights to answer certain inquiries put concerning the salary and powers of the State treasurer,²⁴⁵ the duties of the governor and auditor in administering appropriations when questions of priority were raised,²⁴⁶ and the powers of the auditor and board of equalization over assessments.²⁴⁷

c. *Appointment and Removal Powers of Executive Officers.* Most of the thirty-four cases²⁴⁸ placed here deal with the appointive power of the governor: does it extend to the selection of particular officials—the commissioners of pilots,²⁴⁹ certain county officers,²⁵⁰ the census superintendent,²⁵¹ a committee of investigation,²⁵² an unnamed State official,²⁵³ the board of public works,²⁵⁴ a justice of the supreme court,²⁵⁵ the matron of the insane hospital,²⁵⁶ or the filling of particular vacancies—in the United States house of representatives,²⁵⁷ on the railroad commission or board of agriculture,²⁵⁸ among county officers gen-

²⁴³ In re Opin. of Judges, 62 Fla. 4.

²⁴⁴ In re Advisory Opin. to the Governor, 64 Fla. 1.

²⁴⁵ In re HR. No. 25, 15 Colo. 602.

²⁴⁶ In re Priority of Legislative Appropriations, 19 Colo. 58.

²⁴⁷ In re Assessment of Property, etc., 25 Colo. 296.

²⁴⁸ This includes two that are extra-constitutional.

²⁴⁹ Opin. of the Justices, 154 Mass. 603.

²⁵⁰ Statement of Facts, and Questions, 38 Me. 597.

²⁵¹ In re the Census Superintendent, 15 R. I. 614.

²⁵² In re the Investigating Commission, 16 R. I. 751.

²⁵³ In re Advisory Opin. to the Governor, 65 Fla. 434.

²⁵⁴ In re SB. Providing for a Board of Public Works, etc., 12 Colo. 188.

²⁵⁵ In re Supreme Court Vacancy, 4 S. D. 532.

²⁵⁶ In re Board of Public Lands and Buildings, 18 Nebr. 340.

²⁵⁷ In re the Representation Vacancy, 15 R. I. 621.

²⁵⁸ In re Railroad Commissioner, 28 R. I. 602.

erally,²⁵⁹ or in the court of appeals;²⁶⁰ does it authorize the appointment of women as notaries public,²⁶¹ or on the board of health, lunacy and charity,²⁶² or as county treasurer,²⁶³ or the preferment of Civil War veterans in civil service appointments,²⁶⁴ or the appointment of members of the legislature to the boards of State institutions?²⁶⁵ Except two which deal with the power of appointment in general,²⁶⁶ the other opinions on appointment have to do with miscellaneous questions: the governor's power to fill vacancies on a corporation,²⁶⁷ his right to appoint the first incumbent of an office when the legislature fails to elect,²⁶⁸ the method of filling vacancies to which the governor has failed to appoint,²⁶⁹ the need of the senate's confirmation of certain appointments,²⁷⁰ and the governor's duty to submit temporary appointments to a special session of the legislature.²⁷¹ Interrogations connected with the power of suspension or removal are much fewer. Two are general in nature,²⁷² three are concerned with particular officials—county

²⁵⁹ Vacancies in Elective County Officers, 25 Fla. 426.

²⁶⁰ Opin. of the Judges of the Court of Appeals, 79 Ky. 621.

²⁶¹ Opin. of the Justices, etc., 150 Mass. 586; and *In re* Opin. of the Justices, 73 N. H. 621.

²⁶² Opin. of the Justices, 136 Mass. 578.

²⁶³ *In re* Opin. of Judges, 62 Fla. 1.

²⁶⁴ Opin. of the Justices, etc., 145 Mass. 587; Opin. of the Justices, 166 Mass. 589.

²⁶⁵ *In re* Members of Legislature, 49 Fla. 269.

²⁶⁶ Opin. of the Justices, 3 Gray, 601; and *In re* Opin. of Justices, 67 Fla. 423.

²⁶⁷ Opin. of the Court, 62 N. H. 704.

²⁶⁸ Opin. of the Justices, etc., 45 N. H. 590.

²⁶⁹ *In re* Decision of Justices, etc., 28 R. I. 607.

²⁷⁰ *In re* Advisory Opinion to the Governor, 45 Fla. 154; and *In re* Question Propounded by the Governor, 12 Colo. 399.

²⁷¹ *In re* Advisory Opin. to the Governor, 64 Fla. 16.

²⁷² Opin. of the Justices, 3 Gray, 601; and Question Submitted, etc., 72 Me. 542.

commissioners,²⁷³ circuit judges,²⁷⁴ and the fire and excise commissioners of a city.²⁷⁵

There are four refusals. In Opinion of the Justices, 62 New Hampshire, 706, an inquiry from the mayor and aldermen of a city as to the location of the power to appoint and remove members of the fire department met with the fate that should have been anticipated. Twice a Florida court declined to express any opinion as to the governor's power to appoint circuit judges, because it would necessitate the interpretation of a statute;²⁷⁶ and in Question Submitted by the Governor, etc., 85 Maine 545, the justices declared that the possible removal of a county attorney did not create a "solemn occasion" calling for their advice.

One of the Canadian opinions is in reply to a reference concerning the power of a provincial lieutenant-governor to appoint Queen's Counsel or grant precedence to selected members of the bar.²⁷⁷

d. *Electoral Duties.* Of the seventeen interrogations relating to the duties of the executive in connection with elections, nine belong to the State of Maine. All of these deal with the extent of the governor's duties in canvassing the returns from an election for county officers,²⁷⁸ or from general elections.²⁷⁹ Similar questions are answered in Opinion of the Justices, 53 New

²⁷³ In re Advisory Opin. to Governor, 64 Fla. 168.

²⁷⁴ Opin. of the Justices, 67 Fla. 489.

²⁷⁵ In re Fire and Excise Commissioners, 19 Colo. 482.

²⁷⁶ In re Opin. of the Justices, 69 Fla. 632; and In re Opin. of the Justices, etc., 69 Fla. 653.

²⁷⁷ Attorney-General for Dominion v. Attorney-General for Ontario, (1898) A. C. 247.

²⁷⁸ Opin. of the Justices, etc., 25 Me. 567; Statement of Facts, and Questions, 38 Me. 597; and Opin. of the Justices, 54 Me. 602.

²⁷⁹ Opin.s of the Justices, etc., 64 Me. 588; Opin.s of the Justices, etc., 64 Me. 596; Opin.s of the Justices, etc., 68 Me. 587; Questions Submitted, etc., 70 Me. 560; Statement and Questions Submitted, etc., 70 Me. 570; and Statement and Questions Submitted, etc., 70 Me. 600.

Hampshire, 640, and Opinion of the Court, 58 New Hampshire, 621, but the same court twice refused to give to the legislature opinions as to the power of the governor to reject certain votes, when the rejection was a *fait accompli*.²⁸⁰ The other four questions were all answered; they deal with the duty or power of the governor to recount ballots in a contested election,²⁸¹ the powers of the secretary of state in counting the signatures on a referendum petition,²⁸² and the duty of the governor to order a new election upon failure to elect a United States representative.²⁸³

e. *Military Questions*. The subject matter of five interrogatories is the constitutional powers of the commander-in-chief of the State's public armed forces (to determine the existence of an exigency calling for the use of the militia in the federal service,²⁸⁴ or to disband companies of militia,²⁸⁵ or to determine the rank of militia officers²⁸⁶), or the position and powers of subordinate militia officers (when the militia is in the service of the United States,²⁸⁷ or in administering an oath to the judge advocate of a court martial,²⁸⁸ or as to tenure generally,²⁸⁹ or when an application for a court martial has been made²⁹⁰). It will be seen that four of these five cases are from Massachusetts and only one of the five is of later date than 1860. There are no refusals.

²⁸⁰ Opin. of the Justices, 56 N. H. 570; and Opin. of the Justices, 56 N. H. 574.

²⁸¹ Opin. of the Justices, 117 Mass. 599; and Opin. of the Justices, 136 Mass. 583.

²⁸² In re Opin. of the Justices, etc., 114 Me., 557.

²⁸³ In re the Congressional Election, 15 R. I. 624.

²⁸⁴ Opin. of the Justices, 8 Mass. 548.

²⁸⁵ Opin. of the Justices, 1 Allen, 197 n.

²⁸⁶ Opin. of the Judges, etc., 5 R. I. 598.

²⁸⁷ Opin. of the Justices, 8 Mass. 548.

²⁸⁸ Opin. of the Justices, 3 Cush. 586.

²⁸⁹ Opin. of the Justices, 132 Mass. 600.

²⁹⁰ Opin. of the Judges, etc., 5 R. I. 598.

f. *The Execution of the Criminal Law.* If we include the seven Oklahoma cases under the capital conviction statute²⁹¹ and three other extra-constitutional opinions, we find twenty-three opinions dealing primarily with questions of the criminal law. Seven of these treat of the executive powers of pardon, commutation and reprieve—the legal effect of the trial judge's recommendation for a commutation,²⁹² the need for the executive council to approve a pardon or commutation,²⁹³ the power of the governor and council to consider an application for pardon,²⁹⁴ whether the executive's pardon can restore voting privileges,²⁹⁵ the executive power to grant reprieves,²⁹⁶ and the duty of the governor to communicate pardons and commutations to a special session of the legislature.²⁹⁷ Three deal with extradition problems—the right of the governor to surrender a convict under sentence, upon a request for extradition,²⁹⁸ his duty to grant extradition under a United States statute,²⁹⁹ or upon the mere request of a foreign state.³⁰⁰ The supreme court justices have also assisted extra-judicially in the consideration of questions as to the power of the governor to order the removal from one county to another of a convict under death sentence,³⁰¹ the power of a prison warden to discharge a prisoner without the executive pardon,³⁰² and the nature of commutation.³⁰³

²⁹¹ See pp. 76-78 *supra*.

²⁹² Opin. of the Justices, 120 Mass. 600.

²⁹³ In re Opin. of the Justices, 190 Mass. 616; and In re Opin. of the Justices, 210 Mass. 609.

²⁹⁴ In re Pardoning Power of Governor and Council, 85 Me. 547.

²⁹⁵ Opin.s of the Judges, etc., 4 R. I. 583.

²⁹⁶ In re Advisory Opinion to Governor, 62 Fla. 7.

²⁹⁷ In re Advisory Opinion to the Governor, 64 Fla. 21.

²⁹⁸ In re Opinion of the Justices, etc., 201 Mass. 609.

²⁹⁹ In the matter of Hughes, 61 N. C. 57.

³⁰⁰ *Respublica v. De Longchamps*, 1 Dall. (Pa.) 111.

³⁰¹ Opin. of the Justices, 11 Cush. 604.

³⁰² Opin. of the Justices, 13 Gray, 618.

³⁰³ In re Opin. of the Justices, 210 Mass. 609.

In *State v. Cleveland*³⁰⁴ the justices very reluctantly gave to the executive council their opinions as to whether a jury found a defendant guilty of murder in the first degree according to the statutes of the State. The statutory opinions in cases of conviction on a capital charge number eight—one in New York,³⁰⁵ seven in Oklahoma.³⁰⁶ As has already been noted,³⁰⁷ two of the referred cases in Oklahoma met with refusals, and the construction of the statute in *In re Opinion of the Judges* (8 Okla. Crim. 467) has undoubtedly limited its application to a considerable extent. Two other refusals should be mentioned. In *In re Opinion of Supreme Court*, 39 Florida, 397, the justices declined to tell the governor what the effect of pardons without the executive approval would be, because this did not involve an interpretation of the executive powers, or whether he had power to issue a death warrant, because this did involve the construction of a statute. A Colorado court has applied this last excuse to a question as to the relation of the pardoning power to the paroling of prisoners.³⁰⁸

g. *Miscellaneous*. As in the case of the legislature, so here with the executive department, it has been found necessary to make a hodge-podge of opinions, for the most part unrelated and unclassifiable. Not a few (nine) deal with the powers and duties of various minor officials—of all civil and military officers under a particular Act of Congress,³⁰⁹ of the president of the senate when acting governor,³¹⁰ of jailers and other persons in

³⁰⁴ 58 Me. 564.

³⁰⁵ *People v. Green*, 1 Denio 614.

³⁰⁶ *State v. Johnson*, 21 Okla. 40; *In re Opin. of the Judges*, 25 Okla. 76; *Opin. of the Judges*, 3 Okla. Crim. 315; *In re Opin. of the Judges*, 4 Okla. Crim. 594; *In re Opin. of the Judges*, 6 Okla. Crim. 18; *In re Opin. of Judges*, 6 Okla. Crim. 210; and *In re Opin. of the Judges*, 8 Okla. Crim. 467.

³⁰⁷ See pp. 77-78 *supra*.

³⁰⁸ *In re Penitentiary Commissioners*, 19 Colo. 409.

³⁰⁹ *Opin. of the Justices*, 14 Gray, 614.

³¹⁰ *Opin. of the Justices*, 7 Me. 483.

dealing with fugitive slaves,³¹¹ in advising a city board of police commissioners,³¹² of the board of land commissioners,³¹³ of the auditor of public accounts,³¹⁴ of the attorney-general in appointing deputies,³¹⁵ and of the board of public lands and buildings as regards State institutions.³¹⁶ Particular powers or duties of the governor are the subject matter of eight opinions—the power to hire legal agents to prosecute a military claim against the United States,³¹⁷ the duty to arrange for the transportation of State officials,³¹⁸ the power, in the absence of statute, to authorize legal proceedings at the expense of the State,³¹⁹ or to alter highways at the expense of certain towns,³²⁰ the power to adjourn the legislature,³²¹ or to summon it in special session,³²² the duty to issue commissions.³²³ Finally there are opinions as to the liability of a county commissioner to impeachment,³²⁴ the title of asylum trustees in asylum property,³²⁵ the need of approval by the governor and council of appointments by a license board,³²⁶ the existence of laws prohibiting racetrack gambling,³²⁷ the effect of the suspension of a governor while

³¹¹ Opin.s of the Justices, etc., 46 Me. 561.

³¹² *In re Police Commissioners*, 22 R. I. 654.

³¹³ *In re Leasing of State Lands*, 18 Colo. 359; and *In re Canal Certificates*, 19 Colo. 63.

³¹⁴ *In re Babcock*, 21 Nebr. 500.

³¹⁵ *In re Appropriations for Deputies, etc.*, 25 Nebr. 662.

³¹⁶ *In re Board of Purchase and Supplies, etc.*, 37 Nebr., 425.

³¹⁷ Opin. of the Justices, 72 N. H. 601.

³¹⁸ *In re Opin. of Justices*, 74 N. H. 606.

³¹⁹ *In re Opin. of Justices*, 75 N. H. 624.

³²⁰ *In re Opin. of the Justices*, 77 N. H. 606.

³²¹ Opin. of the Justices, 18 R. I. 824.

³²² *In the matter of the Executive Communication, etc.*, 15 Fla. 739.

³²³ *In re Advisory Opin. to the Governor*, 31 Fla. 1; and *In re Opin. of the Justices*, 68 Fla. 560.

³²⁴ *In re Opin. of the Justices*, 167 Mass. 599.

³²⁵ Opin. of Justices, 70 N. H. 638.

³²⁶ Opin. of the Justices, 72 N. H. 605.

³²⁷ *In re Opin. of the Justices*, 73 N. H. 625.

under impeachment,³²⁸ the salaries and expenses of the State board of land commissioners,³²⁹ the administration of a particular piece of State land,³³⁰ and the nature of a railroad commission, if created.³³¹

On the other hand there have been nine instances where the justices have declined to give any opinion. Refusal to construe an existing statute was the reason given in *In the matter of Inquiries Submitted, etc.*, 58 Missouri, 369, (relating to the power of the governor to issue commissions) and *In re HR. No. 25*, 15 Colorado, 602, (concerning the powers of the State treasurer). In *Advisory Opinion to the Governor*, 61 Florida, 1, the justices declared that the submission of proposed United States amendments to the legislature was not an executive duty calling for their assistance. No opinion was returned by the Colorado justices to a question as to the powers of the board of land commissioners to extend mineral leases, because the private rights of lessees might be affected.³³² An interrogatory relating to the powers and duties of a police commission was returned unanswered because the term of the inquiring governor had expired, in *Opinion of the Justices*, 70 New Hampshire, 640. Lastly, the Minnesota justices have twice refused opinions—in *Rice v. Austin*, 19 Minnesota, 103, (regarding the governor's duty to transfer land to the land commissioners) and *State v. Dike*, 20 Minnesota, 363, (about the powers of the secretary of state)—on the ground that extra-judicial consultation of the justices was unauthorized by the constitution. It will be remembered that the refusal of the United States supreme court to answer Washington's questions upon the neutral duties of the executive department was based essentially upon this ground. The reason for the refusal in

³²⁸ *In the matter of the Executive Communication, etc.*, 14 Fla. 289.

³²⁹ *In re Questions by the Governor*, 55 Colo. 105.

³³⁰ *In re Opin. of Judges*, 13 S. D. 191.

³³¹ *In re Railroad Commissioners*, 15 Nebr. 679.

³³² *In re Leasing of State Lands*, 27 Colo. 99.

In re Board of Sinking Fund Commissioners, 32 S. W. 414 (Ky.)—when the board of sinking fund commissioners petitioned for advice in connection with the State's prison—is unsatisfactory, for the chief justice waives the question of jurisdiction and contents himself with saying the court would be as much embarrassed in determining the questions as the commissioners. The question of jurisdiction is also left unsettled in In the matter of the Executive Communication, etc., 12 Florida, 653, where the justices avoided expressing an opinion as to the liability of the governor to impeachment by an extra session of the legislature, by declaring there was not a quorum present anyway.

Two opinions by the Canadian supreme court deal with particular powers of the governor-general—to make remedial orders on appeal from provincial statutes,³³³ and to grant licenses.³³⁴

3. *The Judiciary*

As might be expected the number of cases dealing with the third department of government is comparatively small. Of course in this section, as in the two following sections, it should be remembered that the interrogations which occasioned the opinions were, *in verbis*, questions as to legislative or executive powers. It is only when the consideration of these powers is quite subordinate and the emphasis is plainly upon some matter which primarily affects judicial organization and procedure, or the electorate, that the opinion is adverted to under these heads.

Most of the thirty-two opinions collected here are concerned with questions of organization—the tenure of justices of a police court or a justices' court,³³⁵ of justices of county courts,³³⁶

³³³ In re Certain Statutes of . . . Manitoba Relating to Education, 22 Can. S. C. R. 577.

³³⁴ In re International and Inter-provincial Ferries, 36 Can. S. C. R. 206.

³³⁵ Opin. of the Justices, 3 Cush. 584.

³³⁶ Opin. of the Justices, 3 Gray, 601.

of certain justices of the supreme court,³³⁷ of justices of the peace,³³⁸ of a circuit judge,³³⁹ of county judges,³⁴⁰ of certain district judges,³⁴¹ legislative power to change the number or boundaries of judicial districts,³⁴² or the effect of such a change,³⁴³ the appointment or removal of various classes of judges,³⁴⁴ the eligibility of women,³⁴⁵ or of a sheriff, deputy sheriff or coroner,³⁴⁶ or of a register of deeds, to be appointed justice of the peace;³⁴⁷ the effect of the creation of a new court upon a court already existing.³⁴⁸ Several were prompted by questions about the jurisdiction or powers of different courts or judges—the power of a single judge to enter final judgment on a plea of guilty of murder in the first degree,³⁴⁹ the power of inferior judges to instruct juries,³⁵⁰ the jurisdiction of justices of the peace,³⁵¹ or of county courts in probate matters,³⁵² and the pos-

³³⁷ In re Opin. of Judges, 23 R. I. 635; and In re Supreme Court Vacancy, 4 S. D. 532.

³³⁸ In the matter of the Executive Communication, etc., 15 Fla. 735.

³³⁹ Advisory Opinion, etc., 16 Fla. 841.

³⁴⁰ In re Opin. of the Justices, 68 Fla. 560.

³⁴¹ In re Opin. of the Justices, 69 Fla. 653; and In re Election of District Judges, 11 Colo. 373.

³⁴² Opin. of the Judges, etc., 55 Mo. 215; and In the Matter of the Executive Communication, etc., 14 Fla. 320.

³⁴³ In re SR. No. 9, 54 Colo. 429.

³⁴⁴ In re Advisory Opinion to the Governor, 45 Fla. 154; In re Opinion of Justices, 67 Fla. 423; Opin. of the Justices, 67 Fla. 489; and In re Supreme Court Vacancy, 4 S. D. 532.

³⁴⁵ Opin. of the Justices, 107 Mass. 604.

³⁴⁶ Opin. of the Justices, 3 Me. 484.

³⁴⁷ Opin.s of the Justices, etc., 68 Me. 594.

³⁴⁸ Opin. of the Justices, 3 Gray, 601.

³⁴⁹ Opin. of the Justices, 9 Allen, 585. In connection with this opinion see *Green v. Commonwealth*, 12 Allen, 155.

³⁵⁰ In re Opin. of the Justices, 24 R. I. 625.

³⁵¹ In the matter of the Constitutionality of HB. No. 158, 9 Colo. 625.

³⁵² In re SR. Relating to SB. No. 31, 12 Colo. 340. For the questions in this case see SJ. 1889, p. 1155.

sible jurisdiction of a court of appeals, if created.³⁵³ Still others deal with jury problems—the constitutionality of certain restrictions as to jury trials,³⁵⁴ or of petit juries composed of less than twelve men, or of verdicts by less than twelve.³⁵⁵ The remaining questions are miscellaneous in character—the definition of justice of an inferior court,³⁵⁶ whether a judgment of the supreme court can be reversed by legislative enactment,³⁵⁷ the effect of the abolition of district courts,³⁵⁸ the constitutionality of the powers of a court of appeals as contained in a pending bill,³⁵⁹ the beginning of the term of a certain district court,³⁶⁰ and whether a county judge was a county officer within the meaning of the constitution.³⁶¹

In the entire thirty-two opinions there are only two clear refusals, both by the same court in response to the same question—the extent of a Florida governor's powers in the appointment of circuit judges under a statute.³⁶² The dependence of the answer upon the construction of a law differentiated these cases from *In re Opinion of Justices*, 67 Florida, 423, and made a refusal certain. In one other case referred to above, there was a half-way refusal. When asked about the constitutionality of verdicts in civil cases by three-fourths of a jury, a Colorado court pointed out that they had already decided, in a case brought regularly before them, that the legislature was not restricted in dealing with jury trials in civil actions.³⁶³ Now,

³⁵³ *In re Constitutionality of a Court of Appeals*, 15 Colo. 578.

³⁵⁴ *In re Opin. of the Justices*, 207 Mass. 606.

³⁵⁵ *Opin. of the Justices, etc.*, 41 N. H. 550; and *In re SB. No. 142, etc.*, 26 Colo. 167.

³⁵⁶ *Opin.s of the Justices, etc.*, 68 Me. 594.

³⁵⁷ *Opin. of the Supreme Court*, 3 R. I. 299.

³⁵⁸ *Opin. of Court in Response to Governor*, 43 Mo. 351.

³⁵⁹ *In the matter of the Constitutionality of SB. No. 76*, 9 Colo. 623.

³⁶⁰ *In re HR. Relating to HB. No. 218, etc.*, 12 Colo. 359.

³⁶¹ *In re Compensation of County Judges*, 18 Colo. 272.

³⁶² *In re Opin. of the Justices*, 69 Fla. 632; and *In re Opin. of the Justices*, 69 Fla. 653.

³⁶³ *In re SB. No. 142, etc.*, 26 Colo. 167.

they continued, it is not the practice of this court to review decisions in litigated cases, in *ex parte* proceedings; so we can express no further opinion. This is certainly not a refusal. In fact the legislature evidently was satisfied, for the bill was passed.³⁶⁴ However, the reasonableness of such an answer is questionable. It is certainly not in line with the history of the advisory opinion, for it would make it impossible to answer many questions as to the "state of the law" on a particular point, since the "state of the law" does not depend on what a supreme court may do in the future but may well depend on what it has decided in the past.³⁶⁵

Twice the Canadian supreme court has answered judicial questions, once as to the jurisdiction of provincial county courts,³⁶⁶ once as to procedure under the criminal code.³⁶⁷

4. *Suffrage and Elections.*

From a numerical standpoint, this is quite an important section. A full one-eighth of the opinions given under a constitutional requirement in the United States contain questions relating to elections or the exercise of the suffrage. Some inquiries have been repeated in several different instances—the taxation qualification for voters,³⁶⁸ the property qualification,³⁶⁹ the residence qualification,³⁷⁰ the registration requirement,³⁷¹

³⁶⁴ Sess. L. 1899, p. 244.

³⁶⁵ See p. 256 *infra*.

³⁶⁶ *In re County Courts of British Columbia*, 21 Can. S. C. R. 446.

³⁶⁷ *In re Criminal Code*, 43 Can. S. C. R. 434.

³⁶⁸ *Opin. of the Justices*, 11 Pick. 537; *Opin. of the Justices*, 5 Metc. 591; *In re the Providence Voters*, 13 R. I. 737; *In re the Realty Voters*, 14 R. I. 645; *In re Canvassers' Powers*, 17 R. I. 809; and *Opin. to the Governor*, 24 R. I. 630.

³⁶⁹ *In re the Voting Laws*, 12 R. I. 586; *In re the Newport Charter*, 14 R. I. 655; *In re Qualification of Voters*, 19 R. I. 614; and *Opin. of the Justices*, 31 N. C. App.

³⁷⁰ *Opin. of the Justices*, 1 Metc. 580; *Opin. of the Justices*, 5 Metc. 587; *Opin. of the Justices*, 7 Me. 492; and *Opin. of the Justices*, 7 Me. 497.

³⁷¹ *In re the Registry Laws*, 12 R. I. 580; *In re the Polling Lists*, 13 R. I. 729; *In re the Constitutional Amendment*, 16 R. I. 754; and *Opin. of the Justices*, 22 R. I. 651.

the form of ballots,³⁷² and the form or effect of official returns.³⁷³ The introduction of voting machines has prompted inquiries in three instances,³⁷⁴ and the so-called soldiers' voting acts of the Civil War in four.³⁷⁵ In two cases the justices have given advice as to the rights of towns or districts to waive the sending of representatives to the legislature.³⁷⁶ The right of particular classes of people to exercise the suffrage is the subject matter of four opinions—of inhabitants of unincorporated plantations,³⁷⁷ of paupers or indigent persons,³⁷⁸ of negroes,³⁷⁹ and of certain foreign-born residents in territory acquired by treaty.³⁸⁰ Other questions are of a miscellaneous character—the effect of paying a special poll tax upon the right to vote,³⁸¹ the constitutional date for the election of representatives,³⁸² whether annexation to towns confers a right to vote for the representatives from those towns,³⁸³ the power of the governor

³⁷² Opin. of the Justices, 7 Me. 492; Opin. of the Justices, 7 Me. 497; Opin. of the Justices, etc., 64 Me. 596; In re the Ballot Act, 16 R. I. 766; and In re the Ballot Provision, 17 R. I. 825.

³⁷³ Opin. of the Justices, etc., 25 Me. 567; Statement of Facts, and Questions, 38 Me. 597; Opin.s of the Justices, etc., 68 Me. 587; Questions Submitted, etc., 70 Me. 560; and Statement and Questions Submitted, etc., 70 Me. 570.

³⁷⁴ In re HB. No. 1291, 178 Mass. 605; Opin. of the Justices, 19 R. I. 729; and In re Voting Machines, 23 R. I. 630.

³⁷⁵ Opin. of the Justices, 44 N. H. 633; Opin. of the Justices, etc., 45 N. H. 595; Opin. of the Judges, etc., 30 Conn. 591; and Opin. of the Judges, etc., 37 Vt. 665.

³⁷⁶ Opin. of the Justices, 15 Mass. 536; and Opin. of the Justices, 6 Me. 486.

³⁷⁷ Opin. of the Justices, 3 Mass. 568.

³⁷⁸ Opin. of the Justices, 7 Me. 497.

³⁷⁹ Opin.s of the Justices, etc., 44 Me. 505.

³⁸⁰ Opin.s of the Justices, etc., 68 Me. 589; there are two separate interrogatories here.

³⁸¹ Opin. of the Justices, 18 Pick. 575.

³⁸² Opin. of the Justices, 23 Pick. 547.

³⁸³ Opin. of the Justices, 6 Cush. 578.

or aldermanic boards to recount ballots in contested elections,³⁸⁴ the effect of making a grant of municipal suffrage to women conditional upon the approval of a majority of a certain class of voters,³⁸⁵ the power of the legislature to permit women to vote upon a proposed constitution,³⁸⁶ or to divide towns into voting districts,³⁸⁷ or to provide a special election for delegates to a constitutional convention,³⁸⁸ the governor's right to reject illegal ballots,³⁸⁹ the legality of certain irregular votes,³⁹⁰ the form of a petition for a referendum,³⁹¹ the legality of election by pluralities,³⁹² the power of a town council to order a new election,³⁹³ the method of marking the ballot,³⁹⁴ the legality of an order for a new election,³⁹⁵ the procedure in an election by both houses of the legislature,³⁹⁶ the power of a city council to elect the school committee,³⁹⁷ and the control of nominations by political parties.³⁹⁸

Two things are worthy of notice. All but eight of these fifty-seven opinions come from three States—Massachusetts, Maine and Rhode Island. This third midget State alone furnishes twenty-one of them (nearly half of the total number of advisory opinions found in the Rhode Island reports), while Colorado with its total of ninety-two is represented here by a single one. Secondly, there are no refusals. Apparently

³⁸⁴ Opin. of the Justices, 136 Mass. 583.

³⁸⁵ In re Municipal Suffrage to Women, 160 Mass. 586.

³⁸⁶ In re Opin. of the Justices, 115 N. E. 921 (Mass.).

³⁸⁷ In re Opin. of the Justices, 73 N. H. 618.

³⁸⁸ In re Opin. of the Justices, 76 N. H. 586.

³⁸⁹ Opin. of the Justices, 54 Me. 602.

³⁹⁰ Opin.s of the Justices, etc., 64 Me. 588.

³⁹¹ In re Opin. of the Justices, 114 Me. 557.

³⁹² In re the Plurality Elections, 15 R. I. 617.

³⁹³ In re the Narragansett Election, 16 R. I. 761.

³⁹⁴ In re the Vote Marks, 17 R. I. 812.

³⁹⁵ In re the Representative Election, 17 R. I. 820.

³⁹⁶ Opin. of the Justices, 18 R. I. 824.

³⁹⁷ In re Election of School Committee, etc., 28 R. I. 629.

³⁹⁸ In the matter of HB. No. 203, 9 Colo. 631.

questions concerning the suffrage or electoral matters are, as a rule, "important questions" within the meaning of an advisory opinion clause in the constitution. This point is not discussed in any of these opinions, nor is any doubt suggested as to the solemnity of the occasion.

5. *Miscellaneous.*

Nineteen opinions have been relegated to this congeries of odds and ends. Eleven of these have to do with problems connected with the amendment of the State constitution, but in only eight instances did the justices advise on the point referred—the power of the legislature to call a convention to amend the constitution,³⁹⁹ or to determine the mode of submission of amendments to the people,⁴⁰⁰ or to make a new apportionment apply to the election of delegates to a constitutional convention;⁴⁰¹ the powers of a constitutional convention called to propose special amendments, and the possibility of extra-constitutional methods of amendment,⁴⁰² the effect of a decree of the convention as to the time for amendments to take effect,⁴⁰³ the time when an amendment adopted by popular vote takes effect,⁴⁰⁴ the extent of publicity required for amendments proposed to the people,⁴⁰⁵ the form of such amendments and the effect of a popular adoption of two contradictory amendments.⁴⁰⁶ But the necessity of construing a statute prevented the Florida justices from telling the governor whether the legislature had duly passed an amendment to be submitted to the people,⁴⁰⁷ and the Colorado supreme court has twice

³⁹⁹ In re the Constitutional Convention, 14 R. I. 649.

⁴⁰⁰ In re Opinion of Supreme Court, 29 R. I. 611.

⁴⁰¹ Deb. Mass. Conv. 1853, I, 138; Jameson, Constitutional Conventions, p. 663.

⁴⁰² Opin. of the Justices, 6 Cush. 573.

⁴⁰³ Opin. of the Justices, 76 N. H. 612.

⁴⁰⁴ In re Advisory Opinion to the Governor, 34 Fla. 500.

⁴⁰⁵ In re HR. No. 10, 50 Colo. 71.

⁴⁰⁶ In re Senate File 31, 25 Nebr. 864.

⁴⁰⁷ In re Advisory Opin. to the Governor, 64 Fla. 1.

refused an opinion upon the constitutionality of bills connected with proposed amendments because the question was not sufficiently definite and the pending bill not far enough advanced.⁴⁰⁸

Of the remaining eight cases, two deal with the care of paupers, under a statute⁴⁰⁹ or in unincorporated places;⁴¹⁰ two with county powers and liabilities,⁴¹¹ two with problems of municipal government;⁴¹² one with the amount of mileage and the choice of routes permitted to members of the legislature;⁴¹³ and one was a request that the justices draft a schedule of English statutes then in force in the State of Pennsylvania.⁴¹⁴ In the New Hampshire case just referred to, an opinion was refused on the ground that a reply could not be of assistance to the interrogator and so the question did not come within the advisory opinion clause.

C. FORM OF REPLIES

Of the eight States in which the advisory opinion clause has found constitutional recognition, only four have set forth any requirements as to the form which such opinions must take. In Rhode Island and Florida, they must be made in writing, and the same result is necessarily attained in Missouri and Colorado by the provision that they must be published in connection with the regular decisions of the court. As a matter of fact, however, probably because of the judicial propensity for exactness and dependence upon precedent, as well as from

⁴⁰⁸ In re HB. No. 495, etc., 26 Colo. 182; and In re SR. No. 7, etc., 29 Colo. 350.

⁴⁰⁹ Opin. of Justices, 1 Metc. 572.

⁴¹⁰ Opin.s of the Justices, etc., 68 Me., 593.

⁴¹¹ In the matter of the Executive Communication, etc., 13 Fla. 687; and In re Funding of County Indebtedness, 15 Colo. 421.

⁴¹² Opin. of the Justices, 67 N. H. 601; and Opin. of the Justices, 52 Me. 595.

⁴¹³ Opin.s of the Justices, etc., 69 Me. 596.

⁴¹⁴ Report of the Judges, etc., 3 Binney 595.

force of habit, advisory opinions have been rendered in writing⁴¹⁵ and, except in a few early cases, have been preserved in the regular reports.

But even at the present time there is some variation in the form of opinions in different States, and this variation was much more marked when the advisory opinion was in its infancy (in the United States). The English practice exercised considerable influence in Massachusetts, not only upon the extent of extra-judicial consultation permitted,⁴¹⁶ but also upon the attitude of the judges and the manner of their responses. In the first opinion given⁴¹⁷ (in 1781), the justices not merely expressed their sensibility of the honor done them by such a reference,⁴¹⁸ but they actually came into the senate to deliver their several opinions in person.⁴¹⁹ This is unique. In the next few cases, the opinions are informally communicated in a letter-like document signed by all the justices. Gradually this borrows from the more studied formality of regular decisions and develops into an impersonal exposition of the law touching the questions submitted. It differs, however, from the decisions in litigated cases, in that the signatures of the advisers are still appended, after the epistolary model. This is the standard form in most of the Massachusetts cases, and, after the practice becomes settled, is followed in New Hampshire, Maine, Rhode Island, Missouri, Florida, and South Dakota as well. But in Colorado the opinions are recorded as given *per Curiam*.⁴²⁰ The reader

⁴¹⁵ Quite possibly the request in the first opinion, of 1781 (126 Mass. 547), that the replies be made in writing to the houses of the Massachusetts legislature had something to do with starting them off right.

⁴¹⁶ See pp. 31-33 *supra*.

⁴¹⁷ Reported in 126 Mass. 547.

⁴¹⁸ Cf. Report of the Judges, etc., 3 Binney, 595.

⁴¹⁹ Cf. the appearance of the judges before the Rhode Island General Assembly in *Trevett v. Weeden*—Thayer, Cases, I, 73.

⁴²⁰ So, too, in *Opin. of the Justices*, 70 N. H. 640; *In re Probate Blanks*, 71 N. H. 621; *In re Construction of Revenue Law*, 2 S. D. 58; and *In re Construction of School Law*, Ch. 9, s. 7, 2 S. D. 71.

should recall that the advisory opinion clause of the Colorado constitution imposes the duty of replying upon the supreme court, while in all the other States the opinions are to be given by the justices of the supreme court.⁴²¹ The judges have taken this quite literally⁴²² and these curial decisions are the result.⁴²³ This is varied somewhat in nearly a score of instances, where, because the questions called for more than the usual categorical replies, the writing of the opinion has been entrusted to some one justice, as in ordinary judicial proceedings; here the opinion is delivered by the justice who composed it, "for the court."⁴²⁴ A similar course has been pursued in a few cases in other States.⁴²⁵

⁴²¹ See p. 51 *supra*.

⁴²² In the matter of the Constitutionality of SB. No. 65, 12 Colo. 466; In re Priority of Legislative Appropriations, 19 Colo. 58; and see pp. 221-22 *infra*.

⁴²³ Cf. the two Florida cases where the opinions are given "in banc," and signed by all the justices—In re Opin. of Justices, 54 Fla. 136; and Advisory Opin. to the Governor, 61 Fla. 1.

⁴²⁴ In the matter of the Constitutionality of SB. No. 65, 12 Colo. 466; In re Appropriations by General Assembly, 13 Colo. 316; In re Funding of County Indebtedness, 15 Colo. 421; In re Speakership of the House of Representatives, 15 Colo. 520; In re Continuing Appropriations, 18 Colo. 192; In re Loan of School Fund, 18 Colo. 195; In re Leasing of State Lands, 18 Colo. 359; In re Priority of Legislative Appropriations, 19 Colo. 58; In re Canal Certificates, 19 Colo. 63; In re Governor's Proclamation, 19 Colo. 333; In re Amendments of Legislative Bills, 19 Colo. 356; In re Penitentiary Commissioners, 19 Colo. 409; In re Fire and Excise Commissioners, 19 Colo. 482; In re Constitutionality of SB. No. 293, 21 Colo. 38; In re State Board of Equalization, 24 Colo. 446; In re House Resolution No. 10, 50 Colo. 71; In re Interrogatories of the Senate, 54 Colo. 166; In re Questions of the Governor, 55 Colo. 17.

⁴²⁵ Opin. of the Judges, etc., 55 Mo. 215; In the matter of Inquiries Submitted, etc., 58 Mo. 369 (practically); In the matter of the Executive Communication, etc., 12 Fla. 651; In the matter of the Executive Communication, etc., 12 Fla. 686; In the matter of the Executive Communication, etc., 14 Fla. 283; In the matter of the Executive Communication, etc., 14 Fla. 285; In the matter of the Executive Communication, etc., 14 Fla. 318; In the matter of the Executive Communication, etc., 14 Fla. 320; In the matter

When the "justices" are required by the constitution to give their "opinions" these curial opinions would seem to be inadmissible. The prototypal advisory opinions in the English constitution were certainly upon an individualistic basis, the judges advising not as an organ of the state but as members of the council.⁴²⁶ The judges of the high court still give their opinions *seriatim* to the House of Lords and the Canadian justices usually follow the same rule in giving advisory opinions. Of course, if the judges are of one mind, there is no reason why more than one opinion should be submitted, provided it be clear that it is the opinion of each judge, as in the standard form in use in the States referred to above.⁴²⁷ It need scarcely be added that both curial and signed unanimous opinions will commonly be the work of a single draftsman.⁴²⁸ But if there is disagreement among the justices, either as to the reasoning or the conclusions, it will necessitate separate opinions.⁴²⁹ This was the practice in England⁴³⁰ but in the early cases in

of the Executive Communication, etc., 15 Fla. 735; Advisory Opin., etc., 16 Fla. 841; and *In re Executive Communication*, etc., 23 Fla. 297.

⁴²⁶ Cf. *Paty's Case* (14 East 92 n.), *Prince of Wales' Case* (Fortescue, 401).

⁴²⁷ Cf. the opinion in *Sackville's Case*, 2 Eden, 371.

⁴²⁸ Cf. the note of the reporter to *Opin. of the Justices*, 52 N. H. 622, concerning the *modus operandi* in *Judicial Opin.*, 35 N. H. 579, where there was a single opinion signed by all the judges: "No authorities were cited in the opinion as finally drawn up for publication, but before the consultation an elaborate opinion had been prepared by one of the members of the court, reviewing at length all the authorities . . . which patience and industry could collect. This opinion was read in consultation, the authorities were carefully considered, the opinions of the judges were taken *seriatim*, and the court were unanimous."

⁴²⁹ "If the questions proposed to the justices came before us as a court and I found myself unable to agree with my brethren, I should defer to their opinion without any intimation of dissent. But the understanding always has been that questions like the present are addressed to us as individuals and require an individual answer."—per Holmes, J., in *In re Municipal Suffrage to Women*, 160 Mass. 586.

⁴³⁰ *Paty's Case* and *Prince of Wales' Case*, *ubi supra*.

this country, even when separate opinions were given, dissenting opinions were sometimes omitted from the advice sent to the executive or legislative department,⁴³¹ the judges apparently thinking the opinion of a majority was conclusive. But in two instances⁴³² the Maine legislature promptly ordered the dissenting justices to send in their opinions as well, and in the first of these cases actually proceeded in conformity with the dissenting opinion. Since Constitutional Law, 35 Maine, 563, there has been no case where a justice has failed to send in an individual opinion or indicate his approval of some other opinion.

Indeed there are quite a good many cases where two or more opinions have been submitted, usually because of disagreement,⁴³³ but sometimes even when the opinions are practically the same.⁴³⁴ In a few cases there are separate replies containing a refusal to express any opinion on the question in

⁴³¹ For example see *Opin. of the Justices*, 3 Me. 484; *Opin. of the Justices*, 6 Me. 506; and later *Opin. of the Court*, 60 N. H. 585.

⁴³² *Opin. of the Justices*, 6 Me. 486; and *Constitutional Law*, 35 Me. 563.

⁴³³ *In re Municipal Suffrage to Women*, 160 Mass. 586; *Opin. of the Justices*, 166 Mass. 589; *In re HB. No. 1291*, 178 Mass. 605; *In re Opin. of the Justices*, 211 Mass. 608; *In re Opin. of the Justices*, 77 N. H. 611; *Opin.s of the Justices*, etc., 18 Me. 458; *Opin.s of the Justices*, etc., 44 Me. 505; *Opin.s of the Justices*, etc., 46 Me. 561; *Taxation of National Banks*, 53 Me. 594; *State v. Cleveland*, 58 Me. 564; *Opin.s of the Justices*, etc., 64 Me. 588; *Opin.s of the Justices*, etc., 62 Me. 596; *In re Opin. of the Justices*, 99 Me. 515; *Opin. of the Justices*, 19 R. I. 729; *In re Ten Hour Law*, etc., 24 R. I. 603; *Opin. of Supreme Court Judges*, etc., 55 Mo. 295; *In the matter of the Executive Communication*, etc., 12 Fla. 689; *In the matter of the Executive Communication*, etc., 14 Fla. 289; *In re Advisory Opinion to Governor*, 62 Fla. 7; and *In re Opin.s of the Justices*, 69 Fla. 632.

⁴³⁴ *In re Municipal Fuel Plants*, 182 Mass. 605; *In re Opin. of the Justices*, 220 Mass. 627; *Opin. of the Justices*, etc., 41 N. H. 553; *In re Opin. of Justices*, 74 N. H. 606; *Opin.s of the Justices*, etc., 44 Me. 505; *Opin.s of the Justices*, etc., 46 Me. 561; *Opin.s of the Justices*, 54 Me. 602; *Opin.s of the Justices*, 58 Me. 590; *Questions Submitted*, etc., 72 Me. 542; *In re Decision of Justices*, 28 R. I. 607; *Opin. of the Court*, etc., 49 Mo. 216; *In the matter of the Executive Communication*, etc., 12 Fla. 653; *In the*

the reference.⁴³⁵ Even where the duty of giving opinions is imposed upon the court instead of the justices, there is no reason why separate opinions should not be given, as in litigated cases. In fact there are two examples of this in Colorado.⁴³⁶ Difficult situations may arise, however, when the majority think that no opinion should be given, while the minority believe the question submitted is within the advisory opinion clause. Where the giving of advice is made an individual duty, on principle the minority justices should be free not only to say the reference is within the constitution, but also to express their opinions.⁴³⁷ On the other hand, if the advice is looked upon as coming from the court, and if the power to refuse opinions exists at all,⁴³⁸ probably the judgment of the majority upon the question of answerability should prevail. Apparently this is the view adopted in *In re Interrogatories of the Senate*, 54 Colorado, 166, by the two dissenting justices, who confine their replies to a disapproval of the court's refusal to give the opinions asked.

This misapprehension as to the force of majority agreement in advisory opinion cases has cropped out occasionally in other States. The failure to include dissenting opinions in Maine⁴³⁹ was evidently the result of an assumption that the

matter of the Executive Communication, etc., 13 Fla. 687; In the matter of the Executive Communication, etc., 13 Fla. 699; In the matter of the Executive Communication, etc., 14 Fla. 277; and In the matter of the Executive Communication, etc., 15 Fla. 739.

⁴³⁵ *In re Opin. of Justices*, 74 N. H. 606; *Opin. of the Justices*, 58 Me. 590; *Opin.s of the Justices*, 95 Me. 564; and *In re Opin. of the Justices*, 103 Me. 506.

⁴³⁶ *In re SB. Providing for a Board of Public Works, etc.*, 12 Colo. 188; and *In re Interrogatories of the Senate*, 54 Colo. 166.

⁴³⁷ Cf. *Opin.s of the Justices*, 95 Me. 564; and *In the matter of the Executive Communication, etc.*, 14 Fla. 289.

⁴³⁸ See pp. 161-77 *infra*.

⁴³⁹ *Opin. of the Justices*, 3 Me. 484; *Opin. of the Justices*, 6 Me. 486; and *Opin. of the Justices*, 6 Me. 506.

majority opinion would, of course, be followed. In another case⁴⁴⁰ where one justice was out of the country, the chief justice states that he has consulted only the other justice, "by whom he is authorized to state the following, as the opinion of a majority of the court." Even the adoption of the opinion of a single dissenting justice as the guiding principle for the legislature⁴⁴¹ did not bring home their mistake to them, for two opinions of 1878⁴⁴² were delivered by the chief justice as the "opinion of a majority of the justices." This erroneous position may have been a corollary of the Maine theory that the opinions of the court were binding upon the interrogators.⁴⁴³ At all events it has now disappeared in Maine,⁴⁴⁴ and has found favor in no other State⁴⁴⁵ save Colorado, and there only as applying to the determination of the duty to give an opinion upon the question asked.⁴⁴⁶

There are five opinions anomalous in form which might be mentioned in closing this discussion. Twice, when the exigency of the occasion necessitated prompt replies, the New Hampshire justices have returned categorical answers to the legislative inquiries, supplementing these later with a more lengthy discussion.⁴⁴⁷ Then there is a peculiar case in Maine,⁴⁴⁸ where,

⁴⁴⁰ Opin. of the Justices, 3 Me. 487.

⁴⁴¹ In Opin. of the Justices, 6 Me. 486.

⁴⁴² Opin.s of the Justices, etc., 68 Me. 593; and Opin.s of the Justices, etc., 68 Me. 594.

⁴⁴³ Statement and Questions Submitted, etc., 70 Me. 570.

⁴⁴⁴ Opin.s of the Justices, 95 Me. 564.

⁴⁴⁵ In In the matter of the Executive Communication, etc., 12 Fla. 689, one justice delivered an opinion for the "majority," but a dissenting opinion was also included. In In re Opin. of the Justices, 193 Mass. 605, and Opin. of the Justices, 196 Mass. 603, a majority opinion is stated in the headnote as the principle decided, but this is doubtless an error of the reporter and not of the court.

⁴⁴⁶ In re SR. No. 10, Concerning Governorship Contest, 33 Colo. 307; and In re Interrogatories of the Senate, 54 Colo. 166.

⁴⁴⁷ Opin. of the Justices, etc., 45 N. H. 595; and In re Opin. of the Justices, 66 N. H. 629.

⁴⁴⁸ Opin. of the Justices, 6 Me. 514.

it appears, the same questions were referred by the acting governor and by the senate, and two justices replied to the former while the third sent a concurrent opinion to the latter. Almost as strange is the opinion of a solitary justice in *In re Election of District Judges*, 11 Colorado, 373. Finally there is a comparatively recent opinion in *Rhode Island*⁴⁴⁹ which is altogether unsigned—quite probably an oversight.

D. EFFECT OF REPLIES UPON INTERROGATORS

Historically, the justification of the advisory opinion is to be found in its value to the legislative and executive departments of the state. In theory, it is the judicious counsel, upon questions of a legal nature, given by men who are by training and experience especially fitted for the solution of such questions. It is entitled to receive only such consideration as its intrinsic qualities merit. It is spoken not *ex cathedra* but as a private recommendation. Furthermore it is often given under circumstances far from favorable to the production of good opinions. “(Questions) are perhaps almost necessarily presented under circumstances indicating that an opinion is expected speedily. And they are received, when the mind, having been greatly exhausted by the pressing labors of other official duties, no longer possesses its natural vigor, and cannot exercise even its accustomed extent of thought or power of reason. And it cannot be allowed the time for that extensive research and patient examination and reflection, which the importance of the questions, often a little aside from the range of its accustomed studies and duties, may demand. And it is not excited to action and aided by the elaborate examination and forcible reasoning of other minds which have been interested to examine and argue them. Opinions formed under such circumstances can scarcely claim the respect which might

⁴⁴⁹ *In re Abolishing School Districts*, 27 R. I. 598.

be readily yielded to those formed under more favorable auspices."⁴⁵⁰

Yet in practice, in the United States, advisory opinions have been received, for the most part, with all the deference accorded to the solemn decisions of a court of last resort. Both the legislative department and the executive department have usually treated the pronouncements of these opinions as final, and shaped their course of action accordingly. It is to be expected that this would be true of a majority of the cases, since the advice, even though not binding, bears the stamp of experts. Also, from a purely practical standpoint, the interrogator would tend to follow the advice given, since he realizes that if the same matter is brought before the same individuals, as a court, in regular judicial proceedings, there is a strong probability that the principles announced in the extra-judicial opinion will be adopted in the judicial decision; and in fact this has often been done, as will be seen in examining the effects of advisory opinions within the judiciary department itself.⁴⁵¹

It will be worth while to make a detailed investigation, in Colorado, of the effect of extra-judicial advice upon the activities of the legislature and governor. On fifty-eight occasions the legislature has referred to the justices questions concerning pending measures. Eleven of these met with refusals, so that subsequent legislative action is immaterial to this inquiry. Among the forty-seven remaining, there is not a single instance where the interrogating legislature took any action in opposition

⁴⁵⁰ Opin. of the Justices, 16 Me. 479. Cf. the words of ex-Justice Morton: "They are called upon to give an opinion, when loaded down with labor, and almost always under circumstances when the question requires to be immediately answered. They have to put off all other things and attend to this, as well as they may, without a hearing, without argument, and without time to investigate authorities, and very likely in a remote part of the Commonwealth, where they are not able to get authorities."—*Deb. Mass. Conv. 1853, II, p. 694.*

⁴⁵¹ See pp. 233-36 *infra*.

to the opinion submitted by the justices.⁴⁵² In twenty-five cases the justices approved the constitutionality of the bills sent to them and the bills were subsequently enacted into law, or at least approved by the interrogating house.⁴⁵³ There are three examples of failure to pass a bill after the justices had expressed their satisfaction as to constitutionality,⁴⁵⁴ but this of course does not signify that the legislature disagreed with the justices on that point. In another case a bill was dropped after favorable answers on a point of procedure and one of construction.⁴⁵⁵ In the other twenty-two opinions, the replies

⁴⁵² In one instance a legislature passed an act disapproved in an opinion given four years earlier. Cf. Sess. L. 1899, 232, with *In re* HB. No. 203, 21 Colo. 27, and *In re* a Bill Providing that Eight Hours Shall Constitute a Day's Labor, 21 Colo. 29, and see *In re* Application of Morgan for Writ of Habeas Corpus, 26 Colo. 415.

⁴⁵³ In the matter of the Constitutionality of HB. No. 18, 9 Colo. 623—Sess. L. 1887, 340; In the matter of HB. No. 231, 9 Colo. 624—Sess. L. 1887, 247; In the matter of the Constitutionality of HB. No. 158, 9 Colo. 625—Sess. L. 1887, 56; In the matter of HB. No. 203, etc., 9 Colo. 631—Sess. L. 1887, 347; In the matter of HB. No. 38, etc., 9 Colo. 631—Sess. L. 1887, 250; In the matter of SR.—in Relation to SB. No. 56, 9 Colo. 632—SJ. 1887, 2057; In re SB. Providing for a Board of Public Works, etc., 12 Colo. 188—Sess. L. 1889, 124; In re HR. Relating to HB. No. 116, 12 Colo. 289—HJ. 1889, 2029; In re SR. Relating to SB. No. 1, 12 Colo. 290—Sess. L. 1889, 228; In re HB. No. 238, 12 Colo. 337—Sess. L. 1889, 360; In re SR. Relating to SB. No. 31, 12 Colo. 340—Sess. L. 1889, 238; In re Constitutionality of a Court of Appeals, 15 Colo. 578—Sess. L. 1891, 118; In re Kindergarten Schools, 18 Colo. 234—Sess. L. 1893, 436; In re Bounties, 18 Colo. 273—Sess. L. 1893, 23; In re Internal Improvements, 18 Colo. 317—SJ. 1893, 1642, SJ. 1893, 1179, HJ. 1893, 1994, SJ. 1893, 1233, HJ. 1893, 2211; In re Governor's Proclamation, 19 Colo. 333—Sess. L. 1894, 3; In re Amendments of Legislative Bills, 19 Colo. 356—Sess. L. 1894, 45; In re Constitutionality of Substitute for SB. No. 83, 21 Colo. 69—Sess. L. 1895, 36; In re Inheritance Tax, HB. No. 122, 23 Colo. 492—HJ. 1897, 874; In re SR. No. 4, 54 Colo. 262—SJ. 1913, 771 and 1293.

⁴⁵⁴ In the matter of HR. re Constitutionality of Legislation Redistricting State, etc., 12 Colo. 186; In re SR. Relating to Constitutionality of Proposed Reapportionment Bill, 12 Colo. 187; and In re Constitutionality of SB. No. 69, 15 Colo. 601—SJ. 1891, 1062.

⁴⁵⁵ In re SR. No. 9, 54 Colo. 429.

were unfavorable and the bills either failed,⁴⁵⁶ or were modified to meet the objections raised by the justices.⁴⁵⁷ Quite often the individual responsible for the bill or the committee in charge of it has moved that it be laid on the table because the supreme court had declared it unconstitutional.⁴⁵⁸ In other instances the bills came to a vote and were lost.⁴⁵⁹ Sometimes they

⁴⁵⁶ In the matter of the Constitutionality of SB. No. 76, 9 Colo. 623—SJ. 1887, 309; In the matter of HB. No. 166, etc., 9 Colo. 628; In the matter of a Bill for an Act, etc., 9 Colo. 629—SJ. 1887, 1074 and 1078; In the matter of the Constitutionality of HB. No. 270 and SBB. No. 69 and No. 106, 9 Colo. 635—SJ. 1887, 1665-6 and 2104, and HJ. 1887, 1612; In the matter of the Constitutionality of S. 9 of HB. No. 122, 9 Colo. 639—HJ. 1887, 1745 and 1762; In re House Resolutions Concerning Street Improvements, 15 Colo. 598; In re HB. No. 10, etc., 15 Colo. 600; In re Loan of School Fund, 18 Colo. 195; In re Compensation of County Judges, 18 Colo. 272—SJ. 1893, 658; In re HB. No. 203, 21 Colo. 27—HJ. 1895, 633; In re a Bill Providing that Eight Hours Shall Constitute a Day's Labor, 21 Colo. 29—HJ. 1895, 723; In re Constitutionality of SB. No. 293, 21 Colo. 38—SJ. 1895, 633; In re Constitutionality of an Act, 21 Colo. 46; In re Consolidation of School Districts, SB. No. 23, 23 Colo. 499; In re Annexation and Consolidation of School Districts, SB. No. 9, 26 Colo. 136; In re HR. No. 10, 50 Colo. 71—HJ. 1911, 704.

⁴⁵⁷ In the matter of the Constitutionality of HB. No. 270 and SBB. No. 69 and No. 106, etc., 9 Colo. 635—HJ. 1887, 1612, and Sess. L. 1887, 340; cf. In the matter of the Constitutionality of SB. No. 76, 9 Colo. 623, with In re Constitutionality of a Court of Appeals, 15 Colo. 578—Sess. L. 1891, 118; In re SR. Relating to Internal Improvement Fund, etc., 12 Colo. 285—SJ. 1889, 1023 and 1413, HJ. 1889, 2529, and Sess. L. 1889, 215, S. 7; In re HR. Relating to HB. No. 349, 12 Colo. 395—HJ. 1889, 2192; In re HB. No. 165, 15 Colo. 593, 595—Sess. L. 1891, 268; In re Extension of Boundaries, etc., 18 Colo. 288—Sess. L. 1893, 131, see S. 2 on p. 135.

⁴⁵⁸ In the matter of the Constitutionality of SB. No. 76, 9 Colo. 623—SJ. 1887, 309; In the matter of the Constitutionality of HB. No. 270 and SBB. No. 69 and No. 106, etc., 9 Colo. 635—SJ. 1887, 1665-6, and HJ. 1887, 1612; In re Compensation of County Judges, 18 Colo. 272—SJ. 1893, 658, and cf. *ibid.* 822; In re HB. No. 203, 21 Colo. 27—HJ. 1895, 633; In re a Bill Providing that Eight Hours Shall Constitute a Day's Labor, 21 Colo. 29—HJ. 1895, 723; In re House Resolution No. 10, 50 Colo. 71—HJ. 1911, 704.

⁴⁵⁹ In the matter of a Bill for an Act, etc., 9 Colo. 629—SJ. 1887, 1074,

simply died a natural death. When the subject matter was deemed sufficiently important the legislature has preferred to resort to the process of constitutional amendment rather than waste time in passing measures which the justices had frowned upon. For example, after several attempts to enlarge the powers of the city of Denver, and to consolidate school districts therein with contiguous districts,⁴⁶⁰ a comprehensive amendment to the constitution was proposed and adopted as Article XX, on November 4, 1902. However, in connection with the eight hour law, the adverse opinions of *In re HB. No. 203*, 21 Colorado, 27, and *In re a Bill Providing that Eight Hours Shall Constitute a Day's Labor*, 21 Colorado, 29, were not sufficiently compelling, and it required a formal decision⁴⁶¹ to bring about the constitutional amendment proposed in Session Laws 1901, page 108, and adopted at the following election.

Turning to the executive department, it is obviously much more difficult to ascertain the precise effect of advisory opinions upon executive action. That must await the writing of a detailed financial history of the State, embodying the results of an examination of hundreds of auditor's and departmental reports and thousands of warrants and the relating of these to appropriation and revenue bills and treasurer's reports; for the most important of the gubernatorial interrogatories have had to do with the administration of State finances. Still we can find evidences here and there that the members of the executive department have had great respect for extra-judicial advice. How unreservedly successive governors have followed the doctrine as to excess appropriations laid down in *In re Appropriations by General Assembly*, 13 Colorado,

1078; *In the matter of the Constitutionality of s. 9 of HB. No. 122*, 9 Colo. 639—HJ. 1887, 1745, 1762.

⁴⁶⁰ *In re Constitutionality of SB. No. 293*, 21 Colo. 38; *In re Consolidation of School Districts*, SB. No. 23, 23 Colo. 499; and *In re Annexation and Consolidation of School Districts*, SB. No. 9, 26 Colo. 136.

⁴⁶¹ *In re Application of Morgan for Writ of Habeas Corpus*, 26 Colo. 415.

316, has already been pointed out.⁴⁶² Another illustration is at hand in *In re Fire and Excise Commissioners*, 19 Colorado, 482. In attempting to remove the fire and excise commissioners of Denver from office, the governor had met with armed resistance and had summoned the militia forces to aid him. While conflict was imminent, the governor paused to ask the justices of the supreme court who were the lawful fire and excise commissioners. In their reply, the justices stated that, assuming the facts as given by the governor, he had lawfully exercised the power of removal, and then went on to tell him that it was not part of his executive duty to enforce his order of removal but that the constitutional remedy was by judicial proceedings. At once, cases were brought against the recalcitrants by *quo warranto*.⁴⁶³

It seems probable that the advisory opinion occupies a similar position in the other States where it has been introduced. Dr. Holcombe of Harvard University⁴⁶⁴ tells us the opinion of the justices in Massachusetts "is invariably accepted." That this has been true from the beginning is indicated by *Opin. of the Justices*, 126 Massachusetts, 547 (1781) and *Opin. of the Justices*, 115 Massachusetts, 602 (1874). Indeed, not long ago the court probably was responsible for the initiation of a piece of legislation. In *In re Opin. of Justices*, 209 Massachusetts, 607, an opinion was given as to the constitutionality of a workmen's compensation act, and it was intimated (at page 612) that the decisions of a board created by the act would have to be enforced by judicial proceedings. The following year an amendment was passed⁴⁶⁵ providing for a decree by the superior court based on the decision of the board in each case.⁴⁶⁶ There

⁴⁶² See pp. 115-116 *supra*.

⁴⁶³ *People v. Martin*, and *People v. Orr*, 19 Colo. 565. Cf. the *quo warranto* against the lieutenant-governor in *In the matter of the Executive Communication*, etc., 12 Fla. 653.

⁴⁶⁴ See pp. 38-39 *supra*.

⁴⁶⁵ St. 1912, c. 571, s. 14.

⁴⁶⁶ *Per Rugg, C. J.*, in *McNichol's Case*, 215 Mass. 497, at 502.

is a single case in Maine where the legislature adopted the dissenting opinion of one justice,⁴⁶⁷ and it appears that the governor did not follow the rules laid down in Questions Submitted, etc., 70 Maine, 560, but it is quite likely they had not yet reached him when he took action.⁴⁶⁸

A word might be said about the effect of refusals. As a rule, when the justices have declined to express any opinion upon questions submitted, there has been no official remonstrance from the other departments. If the cause of the objection can be removed by a rephrasing of the question, sometimes this is done,⁴⁶⁹ but more often the whole matter is dropped. There is one notable exception. In 1889 the Massachusetts house of representatives asked the justices to construe certain educational statutes "with a view to further legislation on the subject matter" thereof. The justices declined to do so and explained that the reference did not disclose a "solemn occasion." The reply was referred to the judiciary committee, which made a report of considerable length, contending that it was for the house to determine the solemnity of the occasion and that in any case the question was within the precedents. Accordingly the house, by a vote of one hundred sixty-eight to eight, passed a resolution "that the house of representatives does not acquiesce in the conclusion of the justices as to the limitation of the authority of the house to require the opinions of the justices; and affirms the authority of the house under the constitution to require their opinions upon said questions."⁴⁷⁰ The merits of both sides will be considered at another place.⁴⁷¹

⁴⁶⁷ Opin. of the Justices, 6 Me. 486.

⁴⁶⁸ Statement and Questions Submitted, etc., 70 Me. 600.

⁴⁶⁹ In re Opin. of the Justices, 211 Mass. 630, and In re Opin. of the Justices, 211 Mass. 632; In the matter of the Constitutionality of HB. No. 18, 9 Colo. 623; In re HB. No. 165, 15 Colo. 593, 595; and In re a Bill Providing that Eight Hours Shall Constitute a Day's Labor, 21 Colo. 29.

⁴⁷⁰ HJ. May 16, 1889. The refusal of the judges is recorded in Functions of Judiciary, 148 Mass. 623.

⁴⁷¹ See pp. 161-77 *infra*.

Similarly the Colorado justices in 1913 refused to answer questions regarding the lieutenant-governorship, for lack of a "solemn occasion."⁴⁷² A motion was made in the senate that that body declare the occasion *is* solemn within the constitution and again request an answer, but this did not come to a vote.⁴⁷³

⁴⁷² In re Interrogatories of the Senate, 54 Colo. 166.

⁴⁷³ SJ. 1913, 308.

CHAPTER III

THE INTERPRETATION OF ADVISORY OPINION CLAUSES

Having reviewed the history of the advisory opinion and the scope and manner of its application in the United States, we are now in a position to consider more in detail the construction that has been given to constitutional clauses providing for such opinions, and to attempt the formulation of certain general rules which have guided the justices in their advisory practice. The material for such an examination will be found, for the most part, in those cases where an opinion on the questions referred has been refused, for, as a rule, the justices have analyzed the clause critically only when a doubt arose as to their obligation to comply with the request made.

So it will be in order, preliminarily, to ascertain whether they may ever, of right, decline to give opinions requested. On principle, it would seem that answers should be given, unless the question is indisputably outside the scope of the constitutional requirements,¹ except possibly when the interrogatory calls for the determination of a case then pending in the courts. The purpose of the provision is to make the justices constitutional advisers to one or both of the other departments of the government, in cases of an especially difficult or serious nature. An adviser who can withhold advice at his discretion must be very unsatisfactory. But, it is objected, since the justices are bound to answer only if the question conforms to a certain description, it follows that they are entitled to refuse an opinion if, in their judgment, the question fails to meet the constitutional requirements. This argument proceeds on the assump-

¹ E.g. a question, in Florida, dealing with a *statutory* executive power.

tion that this is a proper case for the exercise of judicial discretion, that the famous argument of Marshall, C. J., in *Marbury v. Madison* is applicable—just as the courts are bound to determine for themselves whether an act of congress which has the appearance of law is really a law, having been made in pursuance of the constitution, so the justices, if not bound, are at least entitled, to determine for themselves whether a question submitted for their opinion is within the words of the constitution governing such references. But, even if we unreservedly accept the reasoning in *Marbury v. Madison*, the two cases are really not at all comparable. In the one, the *courts*, in the exercise of the *judicial* functions imposed upon them, must necessarily determine what they are going to apply as the command of the sovereign; they may set up their own standards or take the fiat of the legislature. In the other, the *justices*, acting *extra-judicially* as the constitutional advisers of other officials, are called upon to give opinions which, as they themselves usually admit and claim, can have no effect judicially, but which those other officials deem necessary and valuable advice to assist them in determining their course of action. If the question is properly a judicial one, i.e., a question the determination of which would involve the adjudication of a pending case, the doctrine of the separation of powers is, perhaps, a sufficient objection to the giving of an opinion. But if it is a question the answer to which is essentially of interest only to the interrogator, in the exercise of executive and legislative, i.e., political, powers, why should the giving of that answer be in the discretion of the advisers? The courts will not pass upon questions of a political nature² or attempt to control the other departments in the exercise of their political power. It is not quite clear that the reference of questions to the justices is the exercise of a political power, but it would seem more reasonable so to consider it in most cases, for it is commonly a step taken by the

² Willoughby, *Const.*, II, pp. 999 sqq.

interrogator as incidental to the exercise of such power. In any case, is it not for the interrogator to decide whether the occasion and question are such as to warrant his asking counsel from his legal advisers? It is not unusual for the executive or legislative departments or officials thereof, to be given the last word in matters of constitutional construction.³ It is no reply to point out that if this principle be admitted, there is no method of enforcing constitutional restrictions upon those departments. It should be acknowledged that the sanction for such restrictions is moral and political, not legal. Many examples of such *leges imperfectae* might be adduced. Legislatures are commonly made the final judges of the elections, returns and qualifications of their members; yet special requirements for such members are imposed by the constitution. Undoubtedly no court would venture to review the construction placed upon those requirements by a legislature.

If we are to give careful attention to the wording of the constitutional provision requiring advisory opinions, possibly a distinction should be made between those States where certain

³ "It follows, therefore, that every department of the government and every official of every department may at any time, when a duty is to be performed, be required to pass upon a question of constitutional construction. Sometimes the case will be such that the decision when made must from the nature of things, be conclusive and subject to no appeal or review, however erroneous it may be in the opinion of other departments or other officers; but in other cases the same question may be required to be passed upon again before the duty is completely performed. The first of these classes is where, by the constitution, a particular question is plainly addressed to the discretion or judgment of some one department or officer, so that the interference of any other department or officer, with a view to the substitution of its own discretion or judgment in the place of that to which the constitution has confided the decision, would be impertinent and intrusive. Under every constitution, cases of this description are to be met with; and, though it will sometimes be found difficult to classify them, there can be no doubt, when the case is properly determined to be one of this character, that the rule must prevail which makes the decision final." Cooley, *Constitutional Limitations*, pp. 54-5.

governmental organs or officials are empowered to require opinions in certain classes of cases,⁴ and those States where the justices are charged with the duty of giving opinions in certain classes of cases;⁵ for it may be argued that the grant of a power, not purely ministerial, implies a discretion as to the occasion for the exercise of that power, and the imposition of a limited duty similarly carries with it the right to refuse performance of the duty, if, in the judgment of the person obliged, the limits have not been observed. However, this does not get us very far, first because the power and duty are here interdependent and logically it would result that a discretion rests upon both the questioner and the questioned, which practically means that the latter can answer or refuse at will; and secondly, because this change in wording (beginning with Maine) is apparently accidental and neither the legislative department nor the executive department nor the courts have rested any weight upon it.

Whether a question will be asked or not of course rests in the discretion of the inquirer. Whether or not a governmental official is bound to answer depends upon his obligations under the constitution. Now if the constitution is ambiguous, as in this case, the purpose of its framers should determine the extent of the obligation. From an examination of the historical antecedents as well as the debates of constitutional conventions, we are justified in concluding that the purpose of the advisory opinion scheme was to secure to officials whose connection with the government is merely temporary, whose qualifications for dealing with the difficult problems of political science are often meagre and whose ordinary sources of information are sometimes prejudiced or inadequate, the expert advice of other officials upon questions with which they are especially competent to deal thoroughly and without prejudice. It would seem

⁴ Massachusetts, New Hampshire, Florida, and South Dakota.

⁵ Maine, Rhode Island, Missouri, and Colorado.

to follow that the only admissible reasons for declining a request for such advice are that the request did not come from an authorized source, or that the question is plainly, and not as a matter of judicial construction as opposed to executive or legislative construction, not within the intent of the words of the constitution,⁶ or that an answer would be inconsistent with the chief duties of the adviser.⁷

This conclusion is fortified by the history of extra-judicial advice in England. It has already been pointed out⁸ that in the eighteenth century the king as well as the House of Lords had an unquestionable right to the counsel of the judges, not only in the exercise of judicial functions, but in the exercise of executive and legislative functions, unless the giving of such counsel entailed passing upon a particular case then pending.⁹ The desuetude of this practice in the nineteenth century, at least as far as the executive is concerned, is probably due to

⁶ See note 1, p. 161 *supra*.

⁷ "Quando aliquid mandatur, mandatur est omne per quod parvenitur ad illud. A special authority is granted. A prerogative would be null unless it carried with it the proper discretion to exercise it. The power to demand necessarily implies the right to a reply. For whenever there is authority on the one hand, there must be a corresponding duty upon the other. There is a well defined distinction between a judge acting juridically, and a judge acting in the capacity of an adviser. The former adjudicates, settles and decides; the latter gives an opinion upon questions propounded; he throws upon them the light of his learning. . . . The true construction of the provision requiring the judges to answer, according to the weight of reason and authorities, would seem to be that the judges are always obliged to answer except when the same matter is actually pending before them juridically. To require them to answer when they are actually called on as judges, acting juridically, would interfere with the independence of the judiciary." H. A. Dubuque, in *Am. L. Rev.*, XXIV, p. 369, at pp. 396-7.

⁸ See pp. 6, 16, 22 and 27, *supra*.

⁹ See especially the opinions of the majority of the judges and the opinions of the Lords in *McNaghten's Case*—10 Cl. and Fin. 200—and the opinion of the Judicial Committee in *Attorney-General for Ontario v. Attorney-General for Canada*—(1912) A. C. 571.

the creation of the Judicial Committee of the Privy Council, which is bound to advise the king on any question whatsoever, upon request.¹⁰ The comprehensiveness of this statutory obligation is itself not negligible evidence of the extent of the obligation resting upon the king's councillors (including the judges) under the unwritten constitution.

On the other hand, it must be admitted that in the United States there is considerable authority for the right of the justices to refuse their opinions at their discretion, on various grounds. The early New England practice is not essentially discrepant with the principles developed above. Thus in Massachusetts, when questions were put which were intimately connected with private interests, though the judges were reluctant to express an opinion, yet apparently they felt bound to do so under the constitution.¹¹ In one case,¹² they seriously considered "whether it might not be expedient first to submit to the consideration of the Honorable House, whether it would be expedient to request an *ex parte* opinion in such a case;" but concluded that since the opinion would not bind anyone and so could not affect the rights of the parties, "should they hereafter be brought before the court in a regular course of judicial proceeding," an answer might be given. Justice Story, in speaking to the constitutional convention of 1820, said that "as the constitution now stands, the judges are bound to give their opinions if insisted upon, even in a case where private rights are involved."¹³ Ex-Justice Morton took the same position in the convention of 1853.¹⁴ So, too, in New Hampshire, the justices felt obliged to attempt an answer to a question to which great difficulty

¹⁰ 3-4 Wm. IV, c. 41, s. 4, and cf. Macqueen, House of Lords, p. 689 n., and *In re Schlumberger*—9 Mo. P. C. 1.

¹¹ Opin. of the Justices, 7 Pick. 125, 130 n.; Opin. of the Justices, 5 Metc. 596; and Opin. of the Justices, 9 Cush. 604.

¹² Opin. of the Justices, 5 Metc. 596.

¹³ Deb. Mass. Conv. 1820, p. 489.

¹⁴ Deb. Mass. Conv. 1853, II, p. 694.

attached because of its very general nature.¹⁵ Again, in Maine, as late as 1870, opinions were given in a particular case of an altogether private nature, which was all but pending before the court, since the individual concerned was free to appeal from the conviction and sentence of the lower court.¹⁶ Only one justice (Kent, J.) enters a serious objection to answering, and though he points out clearly the necessary and reasonable limitation upon the advisory opinion power under the constitution,¹⁷ he is consoled for the "unfortunate precedent" by the fact that his opinion favors the prisoner and "cannot have any authoritative force in any possible future proceedings in the case."

It was only seven years later that the Massachusetts justices were responsible for an opinion¹⁸ which may, perhaps, be called the fountain-head of nearly a score of refusals on the part of justices in Massachusetts, New Hampshire and Maine, to act as advisers of the other departments.¹⁹ Two questions were referred to them by the house of representatives: (1) Is a special justice of a municipal, district or police court ineligible to the house of representatives under Amendment VIII of the constitution? (2) If so, does acceptance of the legislative vacate the judicial office? The justices pointed out that their opinions could only be required upon "important questions of law and upon solemn occasions," and declared in effect that an occasion could not be solemn unless the body making the inquiry

¹⁵ Opin. of the Justices, etc., 25 N. H. 537.

¹⁶ State v. Cleveland, 58 Me., 564.

¹⁷ "When a compliance would violate distinctly and palpably some other constitutional provision, made for the protection of individual rights or involve a pre-judgment of a pending case, by opinions on the points in issue, a conscientious judge may well hesitate or even decline answering."

¹⁸ Opin. of the Justices, 122 Mass. 600.

¹⁹ The Missouri refusals, based on a large discretionary power in the justices, had preceded this, but there is no evidence that the Massachusetts justices had seen them and there is not a single reference to them in the New England opinions cited below.

had occasion to consider the question "in the exercise of the legislative or executive powers," as the case might be. In this particular case the question asked could not be affected by legislative action, and might come before the court in a regular judicial proceeding at any time; so an opinion should be refused. We are not concerned here with the validity of these reasons for refusal²⁰ so much as with the fact that the justices here assumed the right to pass finally upon the solemnity of the occasion. For this assumption there is practically no attempt at justification. The only argument is based on a hypothetical intention ascribed to the framers of the constitution, supposedly necessitated by the principle of separation of powers.²¹ It is true that the members of the constitutional convention of 1780 were firm adherents to this principle, but it is equally true that the separation of powers, as that phrase is understood in the political theory of the United States, is not affected in the slightest by the advisory opinion.

As this argument has been relied upon in a good many opinions, it will be worth while to examine its cogency at this point. That fundamental principle of our constitutional organization known as the separation of powers requires that legislative, executive and judicial functions shall, for the most part, be exercised by separate and independent organs of the state. "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law."²² "It is the province of judicial power . . .

²⁰ See pp. 181-205, 208-214 *infra*.

²¹ "In view of the separation, established by the Constitution, between the legislative, executive and judicial departments of the government, we can hardly suppose it to have been the intention that either the legislature or the executive should demand of the judiciary its opinion, in advance, upon a question which may arise in the course of judicial administration, and which cannot be affected by legislative or executive action." Opin. of the Justices, 122 Mass. 600.

²² per Marshall, C. J., in *Wayman v. Southard*, 10 Wheat. 46.

to decide private disputes between or concerning persons.”²³ The purpose of this separation should be kept in mind, viz., that the judiciary, secure in tenure and compensation from possible encroachments by the other departments, might apply the law according to their best judgment, free from the pressure of political and expediential arguments.²⁴ Now it is well known that in our system there is considerable over-lapping of powers. “The correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions.”²⁵

There are several answers, then, which might be made to the argument of the Massachusetts justices. First of all, the giving of advisory opinions is not a judicial function; such opinions are extra-judicial in character, and, as they bind no one, it is difficult to see how they can interfere with the exercise of judicial power as defined above, unless given in a pending case. Secondly, even if advisory opinions be considered as an interference with the legislative or executive departments, i.e., as an exercise of legislative or executive power, there is no serious violation of the principle of separation of powers, which was put forward to protect the judiciary, not the executive or legislature. But, as a matter of fact, such interference is insignificant, since the justices proffer their advice only when it is

²³ *Merrill v. Sherburne*, 1 N. H. 199, at 203. Cf. “To hear and decide adversary suits at law and in equity, with the power of rendering judgments and entering up decrees according to the decision, to be executed by the process and power of the tribunal deciding, or of another tribunal acting under its orders and according to its direction, is the exercise of judicial power, in the constitutional sense.” *Taylor v. Place*, 4 R. I. 324.

²⁴ *The Federalist*, No. LXXVIII.

²⁵ Willoughby, *Constitution*, II, p. 1263.

requested, and the other two departments may give as much or as little attention to it, even then, as they please. Lastly, even if the rendering of advisory opinions could be considered as a judicial function, it is obvious that its effect on the independence of judicial tenure must be remote. It seems reasonable to conclude that there is no real irreconcilability between the separation of powers and the advisory opinion.

Notwithstanding the weakness of the reasoning in Opinion of the Justices, 122 Massachusetts, 600, a bad precedent had been established, and one which unfortunately found no little favor. The argument was plausible superficially, and furnished a means of escape from a duty often burdensome and sometimes disagreeable. The principle was again enunciated, obiter, by the same justices in 1878,²⁶ and was adopted and applied by an almost entirely different group in 1889.²⁷ This time the house of representatives placed upon its journal a formal protest,²⁸ denying the right of the justices to place such limitations upon questions referred for advisory opinions. The case attracted considerable attention at the time and the action of the house was generally endorsed.²⁹ But the justices had crossed the Rubicon, and at the first opportunity, they stated their position quite explicitly. "In determining whether questions are included in it (the clause), the rights and duties of the house and of the justices are co-ordinate and reciprocal. The house is undoubtedly authorized to require an opinion on all such questions as it deems to be embraced in the constitutional provision, but it must be for the justices to determine whether the requirement thus made is in conformity therewith, and one which they are bound to obey. . . We must for ourselves finally decide whether the occasion contemplated by the constitution

²⁶ Opin. of the Justices, 126 Mass. 557.

²⁷ Functioni of Judiciary, 148 Mass. 623.

²⁸ See p. 159 *supra* and cf. the attitude of the House of Lords in a case cited by Macqueen—see page 27 *supra*.

²⁹ Cf. Albany L. Jour. XL, p. 158; Cent. L. Jour. XXVIII, p. 493; Am. L. Rev. XXIV, p. 369, at pp. 385 sqq.; Harv. L. Rev. III, pp 228-9.

in which our opinion may properly be required has arisen."³⁰ This precedent has been followed in cases of more recent date³¹ and seems firmly rooted in the Massachusetts practice.

The justices of other States were not slow to take it over and attempt to facilitate its development. As early as 1881 we find two Maine justices indicating their approval of Opinion of the Justices, 122 Massachusetts, 600, and testing the solemnity of an occasion by an arbitrary standard of their own.³² They soon won over the rest to their way of thinking,³³ and in 1901 the majority declared in unequivocal terms their right to decline an answer if they deem the solemnity of the occasion insufficient.³⁴ Three justices (Emery, Whitehouse and Peabody, JJ.) submitted a forceful dissenting opinion in which they held that the advisory opinion clause was mandatory and left nothing to the discretion of the judges. (They also questioned the criteria applied, even if the right to refuse an opinion be admitted). Six years later (one of the dissenters having become chief justice meanwhile) they carried the court with them in giving an opinion³⁵ on a question referred under the very circumstances which were responsible for the refusal of Opinions of the Justices, 95 Maine, 564. Of the other two judges who had participated in this latter refusal, Strout, J., had apparently

³⁰ In re Power of Legislature to Require Opinion, 150 Mass. 598.

³¹ In re Opin. of the Justices, 190 Mass., 611; and In re Opin. of the Justices, 217 Mass., 607.

³² Question Submitted, etc., 72 Maine, 542.

³³ Question Submitted, etc., 85 Me. 545.

³⁴ "It is . . . essential, in order that the justices be required to give their opinion, that the questions be submitted upon a solemn occasion; and, however important may be the questions of law submitted, if it clearly appears to the justices that such an occasion does not exist, it is their duty to decline to give their opinion in answer to such questions. . . The justices must determine, each undoubtedly for himself, whether or not that condition existed, although in cases of doubt, it may be the duty of the justices to resolve that doubt in favor of the prerogative of the body propounding the question." Opinions of the Justices, 95 Me. 564.

³⁵ In re Opin. of the Justices, 103 Me. 506.

changed his mind, and Savage, J., registered the solitary protest. Savage has since become chief justice, but no questions have been submitted by the legislature of late, and it is difficult to say whether the justices as a whole would follow the most recent precedent³⁶ or not.

In New Hampshire, too, there is evidence, that, at least from 1879, the judges entertained the opinion that they had considerable discretion in refusing advice to the other departments. The unsatisfactory refusal of Opinion of the Court, 58 New Hampshire, 623, has already been criticised.³⁷ The importance of the question asked is weighed in Opinion of the Court, 60 New Hampshire, 585, though the doubt is resolved in favor of the legislature. But in Opinion of the Justices, 67 New Hampshire, 601, (1892), there is a clear application of one of the tests announced in Opinion of the Justices, 122 Massachusetts, 600,³⁸ resulting in a refusal. This test is quoted with approval in several later cases³⁹ and has evoked no dissent. However, there has been, in New Hampshire, no claim of a right to refuse opinions as comprehensive as in *In re Power of Legislature to Require Opinion*, 150 Massachusetts, 598, or *Opinions of the Justices*, 95 Maine, 564.

The Rhode Island justices have never given any indication of a disposition to withhold desired advice, except in connection with a pending case,⁴⁰ but it must be remembered that the constitution in that State says "any question of law," and so leaves

³⁶ *In re Opin. of the Justices*, 103 Me. 506.

³⁷ See p. 113 *supra*.

³⁸ "The constitution introduces an exception to the rule in some cases, in which the official power or official duty of the senate, the house of representatives or the governor and council is doubtful, and in which the opinions of the justices are desired by one of those bodies upon an important question of law necessary to be determined by the body requiring the opinions." *Opin. of the Justices*, 67 N. H. 601.

³⁹ *In re Opin. of the Justices*, 73 N. H. 621; *In re Opin. of the Justices*, 75 N. H. 613; and *In re Opin. of the Justices*, 76 N. H. 597.

⁴⁰ *Opin. of the Supreme Court*, 3 R. I. 299.

very little opportunity for a difference of opinion as between questioners and questioned.

It is possible that the ultimate cause of the judicial recalcitrancy in New England is to be found in the Missouri practice, which was in its final form before Opinion of the Justices, 122 Massachusetts, 600.⁴¹ In Advisory Constitutional Opinion of the Judges, etc., 37 Missouri, 135, the judges laid down general rules for interrogatories under the new advisory opinion clause and declared, *inter alia*, that "the judges must determine what are 'questions of Constitutional law,' and what are 'solemn occasions' within the meaning of this section," and that "it must have been understood by the framers of (the constitution), and would seem to be the clear intent of the section as it reads, that such questions should be important in reference to the public interest, and the necessary and immediate action of the Legislative or Executive branch of the Government, upon some matter of unusual magnitude and solemn concern for the public good, and on a pure question of law which could only be finally determined by the Supreme Court as a judicial question." The first of these principles is an unsupported usurpation of discretion, the second rests only upon the unsubstantial fabric of a guess. Yet they are without doubt authoritative as to the Missouri practice, and were in fact the death-blow of the advisory opinion in that State. They were expressly reaffirmed in In the matter of the Northern Missouri Railroad, 51 Missouri, 586, and Opinion of the Court, etc., 55 Missouri, 497.

The original wording of the advisory opinion clause in Florida left no doubt as to its mandatory character, and the only construction possible was frankly set forth in the second case under the provision. "It is evident from the language used that there is a discretion vested in the Governor as to requiring opinions, and it is equally plain that there is no discretion in the court, if the opinion required involves, upon a given state of facts, an interpretation of any portion of the Constitution

⁴¹ But cf. note 19 on p. 167 *supra*.

or the expression of an opinion upon any point of law."⁴² In the next case, too, they yielded with great reluctance to the imperative requirement of the constitution.⁴³ In fact, until the amendment of 1875, there is no suggestion of a right to refuse answers, unless the questions come from an unauthorized source.⁴⁴ But after the clause was changed, the judges were only too glad to avail themselves of the undoubted right to decline advice when the inquiries did not bear upon *executive* powers and duties, under the *constitution*; and beginning with *In re Executive Communication, etc.*, 23 Florida 297, there are nine refusals out of a total of twenty-four references. These refusals, it should be pointed out, are not at all comparable to those we have been discussing, in Massachusetts, Maine and Missouri. What is an executive power or duty, and whether that power or duty is constitutional or statutory are, as a rule, questions of fact, more or less susceptible of absolute determination; the importance of a question and the solemnity of an occasion are relative matters, to be estimated in particular cases according to the attendant circumstances, and largely depending upon individual judgment.

In Colorado, the first refusal was due to the fact that the matters referred were then before the courts in litigated cases, as well as to the physical impossibility of answering questions of such generality as those submitted in the time available.⁴⁵

⁴² per Westcott, J., in *In the matter of the Executive Communication, etc.*, 12 Florida, 653.

⁴³ "Protesting that the questions involved in the inquiry are not matters of judicial cognizance, and that the 'opinion' of this court is binding upon no person, the matter being purely of legislative interpretation and adjudication, yet because the Constitution *requires* the court to give opinions 'upon any point of law,' when *required* by the Governor, we are constrained to comply with the *requirement* of the Constitution." In the matter of the Executive Communication, etc., 12 Fla. 686.

⁴⁴ In the matter of the Executive Communication, etc., 12 Fla. 653; and In the matter of the Executive Communication, etc., 14 Fla. 289.

⁴⁵ In the matter of Senate Resolution on the Subject of Irrigation, 9 Colo. 620.

It is also suggested that replies might be refused when the subject matter of the inquiries is not covered by any pending bill; and this is cited with approval in a case of 1889,⁴⁶ where the court assumes "that were such not the fact, the resolution would not be presented." This smacks of the Missouri doctrine, and in the District Attorneys case reported in 12 Colorado, 466,⁴⁷ the theory of judicial discretion in its most positive form is unhesitatingly proclaimed, on the authority of Opinion of the Court in Response to Governor, 49 Missouri, 216. Furthermore, the court is not content with this, but proceeds, in the exercise of that discretion, to work out a very elaborate exegesis of the advisory opinion clause, valuable and instructive in many respects, but going considerably beyond the needs of the principal case. This opinion has been unqualifiedly approved in many more recent cases⁴⁸ and must be accepted as indicating the prevailing practice in Colorado. It is probably responsible for the growth of a larger number of elimination tests than can be found in any other State, as will be seen in examining the special rules listed below. Only once has a judicial voice been raised against the doctrine, in Colorado; in 1913, Scott, J., argued with great assurance, that to permit the court to pass finally upon the importance of a question or the solemnity of an occasion defeated the intention of the constitution.⁴⁹

The restricted form of the advisory opinion in South Dakota has given less opportunity for the development of the doctrine we are discussing. Yet "important question" and "solemn occasion" figure therein; and the doctrine at last appears,

⁴⁶ In re Senate Resolution Relating to Internal Improvement Fund, etc., 12 Colo. 285.

⁴⁷ In the matter of the Constitutionality of SB. No. 65, 12 Colo. 466.

⁴⁸ In re Appropriations by General Assembly, 13 Colo. 316; In re Speakership of the House of Representatives, 15 Colo. 520; In re H.R. No. 25, 15 Colo. 602; In re University Fund, 18 Colo. 398; In re Penitentiary Commissioners, 19 Colo. 409; et al.

⁴⁹ In re Interrogatories of the Senate, 54 Colo. 166.

ushered in on the authority of *In the matter of the Constitutionality of SB. No. 65*, 12 Colorado, 466.⁵⁰ Later cases lend their support⁵¹—and there has been only one reference since 1900.

We must admit, then, that this unhistorical and irrational principle has established itself firmly in most of the States where the advisory opinion exists. It will be clear from the foregoing paragraphs that there have been two foci of infection, so to speak, the opinion in 122 Massachusetts, 600, for Massachusetts, Maine and New Hampshire, that of 37 Missouri, 135, for Colorado and South Dakota. For reasons set forth above, it is submitted that the arguments in both cases are fallacious and lack the merit that should characterize precedents which take rank as leading cases. There is evidence that this has been recognized both in Maine and in Colorado (if only by a solitary justice), and it is to be hoped that judges will remember that the rule of *stare decisis* is less conclusive in constitutional matters, when it is manifest that a previous construction is incorrect,⁵² and will yet return to a better usage. Otherwise the process of constitutional amendment alone can maintain the usefulness of the advisory opinion.

In the absence of constitutional requirement, there is no reason to suppose that judges cannot refuse to advise the other departments of our State governments, if they so desire. There are many examples where such advice has been given, it is true, but never with any acknowledgment of obligation; and there are also numerous instances of flat refusals, sometimes accompanied by a wholesale denial of an obligation to reply under any circumstances. It is obvious, too, that in a system where the composition and powers of the judiciary are not within the control of the legislature, a statutory provision for advisory

⁵⁰ *In re Ch. 6*, Sess. L. 1890, 8 S. D. 274.

⁵¹ *In re House Resolution No. 30*, 10 S. D. 249; and *In re Opin. of the Judges*, 34 S. D. 650.

⁵² Willoughby, *Const.*, I, pp. 51-2, and Baldwin, *Amer. Judiciary*, pp. 57, 60, and cases cited there.

opinions can have no more weight than a request supported only by legislative resolution. The more recent cases indicate that while the judges are probably⁵³ free to comply with such requests, even in the absence of constitutional requirement, still there is a strong tendency to decline.⁵⁴ Even in Canada, where the supreme court is the creature of the legislature, there has been a pronounced inclination to refuse opinions occasionally,⁵⁵ on the ground that the questions referred were not within the statute; but here, the refusals have caused little inconvenience, for the legislature has promptly amended and expanded the statute to meet difficulties that have arisen. In only one case has it been seriously argued that the imposition of advisory duties was *ultra vires* of the legislature,⁵⁶ and the decision of the Privy Council in favor of the statute⁵⁷ has probably settled the matter.

We are now prepared to attempt a codification, as it were, of the law relating to advisory opinions as it is found in the practice of those States where such opinions are required under the constitution. It will be our endeavor to formulate the

⁵³ See p. 78 *supra*.

⁵⁴ In re Board of Sinking Fund Commissioners, 32 S. W. 414 (Ky.); In re Board of Purchase and Supplies, etc., 37 Nebr. 425; Cataract Power Co. v. Buffalo, 115 N. Y. Supp. 1045; and State v. Baughman, 38 Ohio St. 455. Cf. the words of Thayer (Legal Essays, p. 182, at 185), written in 1895: "To say that a court is not obliged to answer, and cannot be obliged to answer by the action of the other departments, is not to say that they cannot answer if they see fit. . . . It seems clear that the judges may answer if they choose to. The precedents . . . indicate only that they need not if they do not choose; and, perhaps also, that it is generally inexpedient to answer when not required by the constitution."

⁵⁵ In re Certain Statutes of . . . Manitoba, etc., 22 Can. S. C. R. 577; In the matter of the Jurisdiction of a Province, etc., 35 Can. S. C. R. 581; and In re Criminal Code, 43 Can. S. C. R. 434.

⁵⁶ In re References by the Governor General in Council, 43 Can. S. C. R. 536.

⁵⁷ Attorney-General for Ontario v. Attorney-General for Canada, (1912) A. C. 571.

rules established by that practice generally, as far as possible, indicating in each case the historical development; but special explanations will be necessary in many instances to define the extent of a rule's application in particular States, and illustrations from the English practice or extra-constitutional opinions will sometimes throw a clearer light on the point under discussion.

1. *The justices are under no obligation to give extra-judicial opinions to an individual or governmental organ not authorized to require them by the constitution.*

There are two general classes of cases where this rule is applied. The first is where the constitution contains an advisory opinion clause, but the request in question does not come from a source named in that clause. These cases are all interrogatories from the executive department. In the beginning, the justices have sometimes waived the lack of authority, falling back upon the exact words of the constitution only in recent years, as their attitude has become more critical. Thus in Massachusetts, though the constitution authorized questions only from "each branch of the legislature, as well as the governor and council," the justices unquestioningly gave advice on several occasions to the governor alone,⁵⁸ and once, semble, to the council.⁵⁹ But in 1912 they suggested that there were grave doubts as to whether either the governor or council could require advisory opinions,⁶⁰ and the following year the point was carefully considered and the governor was told that no answer could be given unless the council joined with him in making the reference.⁶¹ Without doubt the same principle would now be applied

⁵⁸ Opin. of the Justices, 3 Mass. 568; Opin. of the Justices, 22 Pick. 571; Opin. of the Justices, 11 Cush. 604; In re Opin. of the Justices, 210 Mass. 609.

⁵⁹ Opin. of the Justices, 13 Allen, 593.

⁶⁰ In re Opin. of the Justices, 211 Mass. 620; and In re Opin. of the Justices, 211 Mass. 630.

⁶¹ In re Opin. of the Justices, 214 Mass. 602.

to the council. It may be observed, parenthetically, that if this rule be taken in connection with the rule of Opinion of the Justices, 126 Massachusetts, 557, that the question referred must be "necessary to be determined by the body making the inquiry," the governor is as effectually deprived of assistance in his exercise of the veto power, as if the court held this was not an executive function at all, as in Florida.⁶² Even in 1810, a question from the attorney-general, at the suggestion of the house of representatives, was returned without an opinion.⁶³ The form of the New Hampshire clause is the same as that of Massachusetts, but the point we are discussing has not been raised recently in the former State. Two opinions were given to the governor alone in 1866 and 1873.⁶⁴ In 1877, however, the justices refused to consider a request from the city solicitor of Manchester,⁶⁵ and in two later cases they have declined to express approval or disapproval of rules and forms prepared by commissioners and submitted to the court under a statute.⁶⁶ If the justices are careful to answer only requests from an authorized source, they may be compelled, in extreme cases, to assume the difficult task of deciding who is governor⁶⁷ or acting governor,⁶⁸ or even which of two legislatures has a *de jure* existence.⁶⁹

The second class of cases is where the constitution does not authorize advisory opinions at all. It has already been pointed out that in many such cases answers have been given.

⁶² In re Executive Communication, etc., 23 Fla. 297.

⁶³ Commonwealth v. Smith, 9 Mass. 530.

⁶⁴ Opin. of the Justices, 53 N. H. 634; and Opin. of the Justices, 53 N. H. 640.

⁶⁵ Opin. of the Justices, 62 N. H. 706.

⁶⁶ In re School Law Manual, 63 N. H. 574; and In re Probate Blanks, 71 N. H. 621. The primary reason for these refusals was that the court was not asked to advise merely, but actually to validate the rules and forms submitted for its approval.

⁶⁷ In the matter of the Executive Communication, etc., 12 Fla. 653.

⁶⁸ In the matter of the Executive Communication, etc., 14 Fla. 289.

⁶⁹ Statement and Questions Submitted, etc., 70 Me. 570; and Statement and Questions Submitted, etc., 70 Me. 600.

The favored questioners include the governor,⁷⁰ the governor acting through the attorney-general,⁷¹ the governor acting at the request of the legislature,⁷² and various State Boards of which the governor may or may not be a member,⁷³ as well as one or both houses of the legislature,⁷⁴ or committees thereof.⁷⁵ On the other hand there are so many instances where opinions have been refused that there can be little doubt that there is no obligation to give advice either to the legislature⁷⁶ or to any executive official,⁷⁷ in the absence of constitutional requirement.

2. Advisory opinions will not be rendered when the question submitted deals with private rights involved in a case actually before the courts.

Apart from the justification on principle,⁷⁸ there is abundant authority in precedent for this proposition. It is true that under royal pressure the English judges on several occasions

⁷⁰ Opin. of the Judges of the Supreme Court, 30 Conn. 591; Opin. of the Judges of the Court of Appeals, 79 Ky. 621; *People v. Green*, 1 Denio, 614; In the matter of *Hughes*, 61 N. C. 57; cases under the Oklahoma statute (see pp. 76-78 *supra*); and *Respublica v. De Longchamps*, 1 Dall. 111.

⁷¹ In re an Act, etc., 83 N. J. L. 303.

⁷² Opin. of the Judges, etc., 37 Vt. 665.

⁷³ In re School Fund, 15 Nebr. 684; In re Board of Public Lands and Buildings, 18 Nebr. 340; and In re Babcock, 21 Nebr. 500.

⁷⁴ Opin. of the Judges, etc., 32 Conn. 565; In re Railroad Commissioners 15 Nebr. 679; In re State Warrants, 25 Nebr. 659; In re Senate File 31, 25 Nebr. 864; In re Quaere, etc., 31 Nebr. 262; In re House Roll 284, 31 Nebr. 505; Deb. Mass. Conv. 1853, I, p. 138 (N. Y. case); Opin. of the Justices, 31 N. C. App.; and Report of the Judges, etc., 3 Binney, 595.

⁷⁵ In re Appropriations, etc., 25 Nebr. 662.

⁷⁶ Reply of the Judges, etc., 33 Conn. 586; In the matter of the Application of the Senate, 10 Minn. 78; Opin.s of the Justices, etc., 64 N. C. 785; and *State v. Baughman*, 38 Ohio St. 455.

⁷⁷ In re Board of Sinking Fund Commissioners, 32 S. W. 414 (Ky.); *Rice v. Austin*, 19 Minn. 103; *State v. Dike*, 20 Minn. 363; and the opinion of Norval, J., in In re Board of Purchase and Supplies, etc., 37 Nebr. 425, which apparently resulted in a cessation of extra-judicial consultation in Nebraska—see p. 76 *supra*.

⁷⁸ See p. 162 *supra*.

gave extra-judicial opinions in pending cases, but the later and better practice condemned such a course.⁷⁹ In the United States the authorities are in support of the rule as stated almost without exception.⁸⁰ Perhaps in reason the rule should be extended to cover cases where a decision has been reached in some lower court and it is still possible that an appeal may be taken, at least where the case is of a criminal nature;⁸¹ but opinions were given under just such circumstances in *Opinion of the Justices* (9 Allen 585)⁸² and *State v. Cleveland*.⁸³

3. *The possibility that the question submitted may at some time come before the courts in a litigated case is not a sufficient excuse for refusing to give an advisory opinion thereon.*

The writer believes this is the better rule on principle and on authority, although it cannot be denied that there is much in the recent practice that is inconsistent with it. In fact, it is easily demonstrable, that the general adoption of the contrary rule would be so severe an emasculation of the advisory opinion as to make it of insignificant governmental utility. Of the four hundred and ten advisory opinions which have been given in the States where such opinions are authorized by the constitution, two hundred and seven involved dealing with obvious questions of private rights, including both personal rights and property rights. There are also many other questions which could have been brought before a court in various ways. If possible litigation were a conclusive test, advisory opinions could be obtained from supreme court judges only

⁷⁹ See p. 16 *supra*.

⁸⁰ *Commonwealth v. Smith*, 9 Mass. 530; *Opinion of Kent, J., in State v. Cleveland*, 58 Me. 564; *In the matter of Senate Resolution, etc.*, 9 Colo. 620; *In re Continuing Appropriations*, 18 Colo. 192; *In re Priority of Legislative Appropriations*, 19 Colo. 58; and *In re Assessment of Property, etc.*, 25 Colo. 296.

⁸¹ *In re Opin. of the Judges*, 8 Okla. Cr. 467.

⁸² See *Green v. Commonwealth*, 12 Allen 155.

⁸³ 58 Me. 564. The opinion of Kent, J., is worthy of attention.

as to matters of law the final determination of which, under the constitution, rests in the discretion of the executive or legislative departments. But this would confine the scope of such opinions almost entirely to exclusively political matters, a field into which, it is said, the judiciary should be forced as little as possible.⁸⁴ If the advisory opinion is to struggle for existence between these Symplegades, it might as well give up the ghost.

The judges of our courts have not always approached the problem we are discussing from the same point of view. Sometimes they have been content to announce simply that *ex parte* opinions upon questions of private right should not be given, sometimes they have said that questions of private right should only be adjudicated in regular proceedings in court. Several courts have laid down the rule that they will not construe existing statutes in advisory opinions, because private rights may already have arisen thereunder. It is possible, too, to state the proposition in positive terms of inclusion rather than negative terms of elimination, and say that only questions *publici juris* will be made the object of extra-judicial advice. It will be convenient to examine these various statements in turn, as a series of rules, as the different phraseology has suggested different arguments both pro and contra and has been responsible for different developments and applications.

(a) *Ex parte advisory opinions upon questions of private right should not be given.* (?) Although there are quite a number of cases in which this principle has been asserted *obiter*, very few can be discovered where it was the basis for a refusal. The phrase has been persistently misused in both instances. Strictly speaking, an advisory opinion to the executive or legislative departments could only be *ex parte*, if it dealt with contentious matter in which the State was interested as a possible

⁸⁴ Cf. the remarks of Story, J., in 1820, and of ex-Justice Morton in 1853, in Mass., referred to on pp. 35-37 *supra*.

litigant.⁸⁵ Cases of that description are rare, and the practice conflicting. In 1825 the Massachusetts justices reluctantly advised the house of representatives that the State was under no obligation to pay certain land rents to the trustees of a particular estate.⁸⁶ So, too, in 1844, they rendered an opinion as to the sinking fund contribution imposed upon the Western Railroad corporation by statute.⁸⁷ On the other hand as early as 1816, the New Hampshire justices refused to express any opinion upon the power of the legislature to amend private corporation charters; they advanced two reasons—(1) that the constitution “did not contemplate that the opinion of the justices of the superior court should be required upon a mere question of right between the legislature and individuals, but upon important questions of a nature altogether public;” (2) the importance “that to the decision of every question of a new impression, involving private rights, we should not only in fact come, but . . . that those who are interested should have a reasonable confidence that we come, with minds entirely unshackled by preconceived opinions.”⁸⁸ If the first reason is a valid excuse, it would seem to be applicable to the two Massachusetts cases just referred to, but it is evident that either the New Hampshire opinion had not come to the attention of the Massachusetts justices, or that it did not commend itself to them. In so far as the second reason may be taken as referring to cases where the State is not a possible party, it is surely *obiter*. Yet this very extension of the argument to all cases involving private rights has found much favor in recent years and is responsible for a deplorable confusion of the real

⁸⁵ “Of legal proceedings *ex parte* ordinarily implies a hearing or examination in the presence of, or on papers filed by, one party and in the absence of, and often without notice to, the other.”—Webster.

“The term *ex parte* implies an examination in the presence of one of the parties and the absence of the other.”—Bouvier.

⁸⁶ Opin. of the Justices, 7 Pick. 130 n.

⁸⁷ Opin. of the Justices, 5 Metc. 596.

⁸⁸ Opin. of the Court, 62 N. H. 704.

issue. The Massachusetts practice is fairly sound on this point. In *Functions of Judiciary*, 148 Massachusetts, 623, the justices thought that when a question involved private rights there was the more reason to be sure it was within the advisory opinion requirement, but their ultimate refusal was based on an alleged lack of a solemn occasion. Again in 1906⁸⁹ they declared that opinions which might affect the rights of parties not present "ought not to be given, except when needed in the consideration of an important matter of state that calls for official action."⁹⁰ But there is not a single example of a refusal resting clearly and solely upon this "private rights" argument and nowhere is there the confusion which exists in some of the other States, between opinions which may touch upon the rights of unrepresented parties, and *ex parte* opinions. Missouri, with a case of 1874, and Colorado, with a long line of cases beginning in 1887, are primarily to blame for inferior practice. In the Missouri case⁹¹ the house of representatives asked the justices whether a bill extending the time on a debt due the State from a railroad would imperil the State's first lien. The justices, apparently, did not object to giving an opinion because the State's interests were involved, though such an opinion would be truly *ex parte*, but withheld their advice because the question concerned others besides the State, and opinions "upon points which may subsequently come before them in contested cases . . . would be *ex parte*," etc. It is conceivable that they had in mind only actions where the State might be a party, though other Missouri cases⁹² do not encourage so lenient a construction; but there can be no doubt that in the Colorado cases, the justices were referring only to actions between private persons. The source of the confusion

⁸⁹ In re Opin. of the Justices, 190 Mass. 611.

⁹⁰ Cf. *Attorney-General of Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia*, (1898) A. C. 700, for Judicial Committee practice.

⁹¹ Opin. of the Court, etc., 55 Mo. 497.

⁹² *Advisory Constitutional Opin.*, etc., 37 Mo. 135; In the matter of the N. Mo. R. R., 51 Mo. 586; and In the matter of Inquiries, etc., 58 Mo. 369.

is an *obiter dictum* in *In the matter of Senate Resolution, etc.*, 9 Colorado, 620. A list of very general questions on the subject of irrigation⁹³ was returned unanswered, for the very good reason that "there are now in this and other courts in the State actions through which some of these matters are in process of adjudication." It was also quite properly suggested "that a satisfactory response to the resolution would require vast research and extraordinary caution . . . and the period of time provided for a legislative session would hardly be sufficient to return safe and satisfactory answers to more than one such inquiry." But unfortunately the inevitable judicial fondness for enunciating broad principles led them to add that "it could not have been the intention to authorize an *ex parte* adjudication of individual or corporate rights by means of a legislative or executive question; parties must still adjudicate their rights in the ordinary and regular course of judicial proceeding." Possibly even this excuse would have been admissible in this case, if necessary, for the justices objected only to giving such "*ex parte*" opinions "except upon the gravest and most urgent necessity;" and as they pointed out, there was no intimation that the matters involved were covered by any bills before the legislature, while some of the questions certainly appear to be concerned with private rights exclusively. But these qualifications did not attend the doctrine when it made its next appearance (also *obiter*) in *In the matter of the Constitutionality of SB. No. 65*, 12 Colorado, 466. The justices here accepted it, shorn of all qualifications, on the authority of the earlier cases, and tried to reinforce it by a "due process argument."⁹⁴ Henceforth

⁹³ For the questions, see S.J. 1887, p. 650.

⁹⁴ "It is a principle declared by our constitution (Sec. 25, Art. 2), and of universal recognition, that no person shall be deprived of life, liberty or property without due process of law. But there cannot be due process of law unless the party to be affected has his day in court. Yet a careless construction and application of this constitutional provision might lead to the *ex parte* adjudication of private rights by means of a legislative or executive question, without giving the party interested a day . . . in court."

the rule was unquestioned. It has been quoted *obiter* many times,⁹⁵ and has served as authority for several refusals to answer, both when an opinion would really have been *ex parte*,⁹⁶ and when questions of private right alone were involved.⁹⁷ Three times it has served as a basis for refusals to review matters already passed upon in a litigated case, or to "overrule" regular cases in opinions.⁹⁸ It is responsible, also, for two refusals in South Dakota,⁹⁹ where it made its first appearance, *obiter*, in the exact phraseology of 12 Colorado, 466;¹⁰⁰ and for a *dictum* in the dissenting opinion of Norval, J., in Nebraska.¹⁰¹

Evidently there are two kinds of cases to be considered here—the one where there is some possibility of action being brought to which the interrogator, or perhaps the State, would be a party, the other where the private rights of persons not before the court, and of no others, are made the subject of requests for advice. In the first, the opinion, if given, would really be *ex parte*, in the second that phrase is loosely used to mean that parties whose rights might be involved are unrepresented before the court. The first answer to be made to the arguments noted above applies alike to both; it is that since the opinions requested are advisory only and are not binding upon the court or justices if the same matters later come before

⁹⁵ In re Appropriations, etc., 13 Colo. 316; In re Priority of Legislative Appropriations, 19 Colo. 58, et al. It is not clear whether it is *obiter* in In re State Board of Equalization, 24 Colo. 446, In re HB. No. 99, 26 Colo. 140, In re SB. No. 27, 28 Colo. 359, and In re Interrogatories of the Senate, 54 Colo. 166, for several reasons were assigned for these refusals.

⁹⁶ In re Penitentiary Commissioners, 19 Colo. 409; and In re Leasing of State Lands, 27 Colo. 99.

⁹⁷ In re Appointments by the Governor, etc., 21 Colo. 14; and In re Assessment of Property, etc., 25 Colo. 296.

⁹⁸ In re House Resolutions, etc., 15 Colo. 598; In re Assessment of Property, etc., 25 Colo. 296; and In re SB. No. 142, etc., 26 Colo. 167.

⁹⁹ In re Chap. 6, Sess. L. 1890, 8 S. D. 274; and In re House Resolution No. 30, 10 S. D. 249.

¹⁰⁰ In re Construction of Constitution, 3 S. D. 548.

¹⁰¹ In re Board of Purchase and Supplies, etc., 37 Nebr. 425.

them in regular judicial proceedings, the legal rights of individuals cannot suffer from the giving of those opinions. This was recognized in the two Massachusetts cases where actual *ex parte* opinions were given,¹⁰² as well as in Colorado,¹⁰³ and in an extra-constitutional advisory opinion in Connecticut.¹⁰⁴ The Canadian justices have even given an opinion in a case that was practically an appeal from a criminal judgment, relying on the fact that they would not be bound thereby.¹⁰⁵ Perhaps the prevalence of the "*ex parte*" argument in Colorado is due largely to the peculiar theory entertained by the Colorado justices for some

¹⁰² In *Adams v. Bucklin*, 7 Pick. 125, the court states clearly that they do not consider Opin. of the Justices, 7 Pick. 130 n., binding upon them; and in Opin. of the Justices, 5 Metc. 596, they say: "Such an opinion, without notice to the parties, would be contrary to the plain dictates of justice, if such an opinion could be considered as having the force of a judgment, binding on the rights of parties. But . . . as an opinion upon an abstract question, without any investigation of facts, and without argument, must be taken as an opinion upon the precise question proposed, which cannot affect the rights of parties, should they hereafter be brought before the court in a regular course of judicial proceeding, we have thought it best . . . to submit an opinion upon the questions proposed."

¹⁰³ In *In re Fire and Excise Commissioners*, 19 Colo. 482, the court gave a real *ex parte* opinion because of "the gravity of the situation, and the impending danger to life and property," and in the subsequent cases of *People v. Martin* and *People v. Orr* (19 Colo. 565), the court said: "But it could not be assumed that such *ex parte* statement could not be controverted, nor that an opinion based thereon might not require modification when the other side should present their cause in court as they had a right to do. . . . No opinion based upon such statement could have been made to bind the parties contending for official place upon the fire and police board."

¹⁰⁴ "Our action being extra-judicial, and really rather our individual than official action, it cannot be of any binding character whatever. No judge of the Supreme or Superior Court, in any case hereafter before him, would be bound by our opinion. We ourselves should not be bound by it." —Reply of the Judges, etc., 33 Conn. 586.

¹⁰⁵ In *re Criminal Code*, 43 Can. S. C. R. 434; but the Okla. justices declined to give any advice in a similar case—*In re Opin. of the Judges* (8 Okla. Cr. 467).

time, that their advisory opinions had all the force of a regular decision.¹⁰⁶ Thus the statement quoted above from *In the matter of Senate Resolution, etc.*, 9 Colorado, 620, refers to an *ex parte* "adjudication;" and in *In the matter of the Constitutionality of SB. No. 65*, 12 Colorado, 466, the court frankly affirms that advisory opinions in Colorado "have all the force and effect of judicial precedents." Again, in *In re House Resolutions, etc.*, 15 Colorado, 598, it is declared that regular decisions should not be "overruled" in advisory opinions.¹⁰⁷ The *decision* in *People v. Martin* and *People v. Orr* should have cleared away this misunderstanding; but the *ex parte* test is still applied in later cases,¹⁰⁸ and for the same reason,¹⁰⁹ and the justices continue to object to "review" previous decisions

¹⁰⁶ See pp. 228-231 *infra*.

¹⁰⁷ Compare the careful statement of the Massachusetts justices in a recent opinion: "It is not open to the justices in answering questions submitted to them under the Constitution to *attempt* to overrule a decision made by the court in a cause between party and party, or to speculate upon the correctness of such a decision. If such a decision is to be overruled, it can only be after argument in another cause between party and party, where the rights of all can be fully guarded." *In re Opin. of the Justices*, 115 N. E. 978 (Mass.) The italics are mine.

¹⁰⁸ See especially *In re Appointments by the Governor, etc.*, 21 Colo. 14; and *In re Assessment of Property, etc.*, 25 Colo. 296.

¹⁰⁹ The advisory opinion amendment was not "intended to sanction a practice whereby the rights of property or the title to an office or the construction of an existing statute should be determined in an *ex parte* proceeding in answer to either an executive or legislative question."—*In re Appointments, etc.*, 21 Colo. 14. Also: "The various institutions whose rights are involved are not before the court, and they should not be concluded without a hearing."—*In re State Board of Equalization*, 24 Colo. 446. Also see *In re HB. No. 99, etc.*, 26 Colo. 140, and *In re Leasing of State Lands*, 27 Colo. 99. "To answer the questions would . . . involve a determination of private rights in an *ex parte* proceeding. It would necessarily determine the title to the office of Lieutenant-Governor and to whom the salary pertaining to such office properly belongs."—*In re Interrogatories of the Senate*, 54 Colo. 166. "Rights may have arisen or attached which should not be determined in a purely *ex parte* proceeding."—*In re SR. No. 4*, 54 Colo. 262.

in advisory opinions, on the authority of *In re House Resolutions*, etc., 15 Colo. 598, though the same argument is not mentioned again.¹¹⁰ The dissenting opinion of Scott, J., in *In re Interrogatories of the Senate*, 54 Colorado, 166, gives the more approved theory¹¹¹ and we think it can be shown¹¹² that the doctrine of *In the matter of the Constitutionality of SB. No. 65*, 12 Colorado, 466, as to the binding effect of advisory opinions has since been thoroughly discredited in Colorado. It is to be hoped, then, that the justices in that State will yet come to recognize, that since the alleged reason for the *ex parte* test does not exist, the test itself should be abandoned, unless it can be placed on a more substantial basis. In this event, the South Dakota justices might again follow their neighbors' lead, this time in paths laid out on a more reasoned plan.

The second answer may also apply to both, though in different degree. If the interrogator has need for the advice requested that he may know what course to pursue when important questions of a public nature (though perhaps involving private rights) are presented, questions calling for executive or legislative, i.e. political action, that the interests of the commonwealth may be promoted, should not consideration for the general welfare prevail over too scrupulous a regard for private rights? *Salus populi suprema lex esto*. Scott, J., recognized this argument in *In re Interrogatories of the Senate*, 54 Colorado, 166, though perhaps he only intended to extend it to serious crises, such as existed in *In re Fire and Excise Commissioners*, 19 Colorado, 482, and *In re SR. No. 10*, 33 Colorado, 307.¹¹³

¹¹⁰ *In re Assessment of Property*, etc., 25 Colo. 296; and *In re SB. No. 142*, etc., 26 Colo. 167.

¹¹¹ "I do not understand that the answer requested is anything but advisory, and may be reviewed or changed upon a more formal and complete investigation."

¹¹² See pp. 228-231 *infra*.

¹¹³ Cf. the statement in *In re Opin. of the Justices*, 190 Mass. 611: "These opinions . . . ought not to be given, except when needed in the consideration of an important matter of state that calls for official action."

Thirdly, it may be replied that where, as in most of the cases cited in connection with this rule, the basis for the embarrassment of the justices is that parties whose rights are concerned are unrepresented,¹¹⁴ it is, as a rule not difficult to secure the presentation of an argument for all interests concerned, if not from the parties themselves, because unascertained, at any rate from *amici curiae*. We have already seen how easily this is managed in the Canadian practice.¹¹⁵ Under the statute, the court is empowered to provide for the representation of the Dominion, any province, or any person or class of persons who may be interested in a question referred; notice is given of the date set for argument, and a right of hearing is assured.¹¹⁶ Furthermore if any interests affected are not in fact represented, the court can order argument in behalf of those interests by an *amicus curiae* at the public expense. In 1912¹¹⁷ it was forcibly urged upon the Judicial Committee of the Privy Council that this did not assure representation of all interests, and that some might be prejudiced; but the Committee could not be persuaded that advisory opinions given under the Act would be "subversive of justice."¹¹⁸ Counsel have appeared and arguments

¹¹⁴ That this is an important element in the *ex parte* objection may be seen from *In re SR. No. 10, etc.*, 33 Colo. 307, where the court declared the proceeding was not *ex parte* because there were actual litigants (the parties in a governorship contest), though they were not litigants before the supreme court but before the legislature. Also see the remarks of Story, J., in *Deb. Mass. Conv. 1820*, pp. 489-90, and of ex-Justice Morton in *Deb. Mass. Conv. 1853*, II, p. 685.

¹¹⁵ See pp. 81 and 80 *supra*.

¹¹⁶ In *In re Provincial Jurisdiction, etc.*, 24 Can. S. C. R. 170, the court directed that the Distillers' and Brewers' Association be notified of a hearing in which they would be interested.—Cameron, *Supreme Court Practice*, p. 268. Extra counsel were heard in *In the matter of the Representation, etc.*, 33 Can. S. C. R. 594.

¹¹⁷ *Attorney-General for Ontario v. Attorney-General for Canada*, (1912) A. C. 571.

¹¹⁸ Their chief reason for this conclusion probably was that the opinions had no binding force.

have been heard on every question referred to the Canadian Supreme Court, at least since 1892. But certainly the justices of a supreme court do not need statutory or constitutional authority to bring about these same results. As a matter of fact, the representation of private interests which are affected is fairly common in the advisory opinions of the United States. The interested parties themselves have had their position presented by counsel in a good many cases,¹¹⁹ usually at the request of the justices.¹²⁰ In New Jersey the statute that we have already mentioned provided for a "full hearing and consideration,"¹²¹ and counsel were heard for both sides in the only application under the statute that has come to our attention.¹²² In one case under the criminal appeal statute of New York¹²³ argument was heard in behalf of the defendant, and in a North Carolina case¹²⁴ the judges intimated that if the matter submitted "were deemed by them doubtful, they would have been obliged to defer their answer until the parties or their counsel could submit their views." The New Hampshire

¹¹⁹ Opin. of the Justices, 7 Pick. 130 n.; In re Opin. of the Justices, 193 Mass. 605; In re Opin. of the Justices, 66 N. H. 629; Opin. of the Justices, 72 N. H. 601; In re Opin. of the Justices, 75 N. H. 613; In re Opin. of the Justices, 77 N. H. 606; In re Penitentiary Commissioners, 19 Colo. 409; In re Annexation and Consolidation, etc., 26 Colo. 136; In re HB. No. 99, etc., 26 Colo. 140; In re SB. No. 27, etc., 28 Colo. 359; In re SR. No. 10, etc., 33 Colo. 307; In re HR. No. 10, 50 Colo. 71; Questions Propounded by Governor, etc., 50 Colo. 84; In re Interrogatories of the Senate, 54 Colo. 166; In re Quaere, etc., 31 Nebr. 262; In re House Roll 284, 31 Nebr. 505; In re Board of Sinking Fund Commissioners, 32 S. W. 414 (Ky.); and *Respublica v. De Longchamps*, 1 Dall. 111 (Pa.).

¹²⁰ When the senate and house of representatives were in doubt as to the financial prerogatives of the senate, the Massachusetts justices heard arguments from both sides before submitting an opinion. Opinion of the Justices, 126 Mass. 557.

¹²¹ One of the constitutional amendments proposed in the New York Convention of 1915 (see p. 68 *supra*) contained a similar phrase.

¹²² In re an Act, etc., 83 N. J. L. 303.

¹²³ *People v. Green*, 1 Denio 614.

¹²⁴ Opin. of the Justices, 31 N. C. App.

justices once delayed an opinion for some time in order to give an opportunity for interested parties to appear, but none came.¹²⁵ In a South Dakota case, both parties offered to appear, but the court declined to act, on other grounds.¹²⁶ The question did not trouble the Florida justices much, under the first form of the clause, for in one case they gave an opinion, where one interested party offered to appear and the other refused.¹²⁷ In a few instances arguments have been heard from one party only, but it may fairly be presumed that opposing interests would have been admitted to a hearing if they had appeared.¹²⁸ Also it is quite possible for *amici curiae* to render assistance.¹²⁹ Arguments from such sources alone would go far to meet this "*ex parte*" objection, for it must be remembered that the justices are asked to pass only upon questions of law, and either the application of the general principles to a particular set of facts is left to regular cases *inter partes*, or, if the principles are based upon certain facts alleged in the inquiry, it is quite clear that there is no objection to a subsequent litigant proving a different set of facts.¹³⁰

A fourth answer that might legitimately be offered is that so-called "*ex parte*" opinions have in fact often been given in cases where private rights, both personal and property, were involved in the questions referred. It has already been mentioned that over half of the advisory opinions rendered in obedience to constitutional requirement in the United States may be so classed. An enumeration would require considerable space and seems to be unnecessary. Examples from any of the States where the clause has been tried may readily be found among the classified cases in Chapter II.

¹²⁵ In re Opin. of the Justices, 73 N. H. 621.

¹²⁶ In re Opin. of the Judges, 34 S. D. 650.

¹²⁷ In the matter of the Executive Communication, etc., 12 Fla. 653.

¹²⁸ In re Opin. of the Justices, 76 N. H. 588; In re HB. No. 165, 15 Colo. 593, 595; In re House Resolutions, etc., 15 Colo. 598; In re HB. No. 10, etc., 15 Colo. 600; and In re Appropriations, etc., 25 Nebr. 662.

¹²⁹ See pp. 206-207 *infra*.

¹³⁰ People v. Martin, and People v. Orr, 19 Colo. 565.

(b) *Questions of private right should only be adjudicated in regular proceedings in court.* Of the truth of this there can be no doubt;¹³¹ but emphasis must be placed upon the word "adjudication." The justices have sometimes made the rule as here stated an excuse for declining to give advisory opinions.¹³² In this aspect all the objections apply to it that were raised in the examination of the preceding rule.

(c) *No advisory opinions should be given in advance of possible cases dealing with the questions referred.* (?)

(d) *Existing statutes should not be construed in advisory opinions.* (?) It will be convenient to consider these two rules together for the second is merely the logical consequence of the first, since it is always possible that cases will grow out of existing statutes. As formulated in (c), the earliest appearance of this proposition was in a Massachusetts case of 1877.¹³³ In addition to the criticisms of this case already suggested,¹³⁴ it may be added here that the refusal of the justices is not consistent with earlier cases,¹³⁵ and was not followed in scores of later cases.¹³⁶ The authority of this opinion has not been recognized in a single instance in any other State. It was cited

¹³¹ See notes 102, 103, 108 in (a) *supra*.

¹³² Advisory Constitutional Opinion, etc., 37 Mo. 135; In the matter of Inquiries Submitted, etc., 58 Mo. 369; In re HR. No. 25, 15 Colo. 602; In re Appointments by the Governor, etc., 21 Colo. 14; and In re Constitutionality of SB. No. 196, 23 Colo. 508.

¹³³ Opin. of the Justices, 122 Mass. 600.

¹³⁴ See pp. 168-170 *supra*.

¹³⁵ Opin. of the Justices, 7 Pick. 130 n.; Opin. of the Justices, 3 Cush. 584; Opin. of the Justices, 1 Metc. 572; Opin. of the Justices, 1 Metc. 580; Opin. of the Justices, 5 Metc. 587; Opin. of the Justices, 5 Metc. 591; Opin. of the Justices, 5 Metc. 596; Opin. of the Justices, 9 Cush. 604; Opin. of the Justices, 8 Gray 20; and Opin. of the Justices, 9 Allen 585 (here a later case actually arose—Green v. Commonwealth, 12 Allen 155).

¹³⁶ Opin. of the Justices, 132 Mass. 600; Opin. of the Justices, 138 Mass. 601; Opin. of the Justices, etc., 145 Mass. 587; In re Public Lighting, 150 Mass. 592; Opin. of the Justices, 154 Mass. 603; Opin. of the Justices, etc., 155 Mass. 598; etc.

in the minority opinion of a Maine justice in 1881,¹³⁷ but his advice was not withheld. However, opinions have been refused in other States, on similar grounds.¹³⁸ More often the rule we are discussing has been announced *obiter*,¹³⁹ or is so associated with other reasons for refusal that it is not clear which was the determining test.¹⁴⁰ From the cases cited in the notes it is evident that it rests upon rather slender authority. In New Hampshire it is supported only by *dicta*, and in a 1909 case,¹⁴¹ the justices actually go out of their way to give an opinion on a point that could "only be properly questioned in a judicial proceeding" in order to assist the governor and council in deciding a question of public policy. In Maine, it only appears *obiter*, and that, too, in minority dissenting opinions. In both these States it has been correctly stated that extra-judicial opinions in advance of possible cases are to be denied *except* upon questions within the scope of the advisory opinion clause of the constitution,¹⁴² though the scope is construed rather narrowly in the Maine cases. The Florida justices are credited with a single weak *dictum*.¹⁴³ South Dakota and Nebraska

¹³⁷ Question Submitted, etc., 72 Me. 542.

¹³⁸ In the matter of the N. Mo. R. R., 51 Mo. 586, and Opin. of the Court, etc., 55 Mo. 497, (advice would have been *ex parte* in these cases); In the matter of the Constitutionality of SB. No. 65, 12 Colo. 466; In re Appropriations, etc., 13 Colo. 316; and In re Penitentiary Commissioners, 19 Colo. 409.

¹³⁹ Opin. of Justices, 70 N. H. 638 (here advice would really have been *ex parte*); In re Opin. of the Justices, 76 N. H. 597; In re Opin. of the Justices, 76 N. H. 601; Opin. of the Justices, 58 Me. 590; In re Priority of Legislative Appropriations, 19 Colo. 58; and In re Construction of Constitution, 3 S. D. 548.

¹⁴⁰ In re Opin. of Supreme Court, 39 Fla. 397.

¹⁴¹ In re Opin. of the Justices, 75 N. H. 613.

¹⁴² Opin. of the Justices, 67 N. H. 601; In re Opin. of the Justices, 76 N. H. 597; and Opin.s of the Justices, 95 Me. 564.

¹⁴³ Under the first form of the clause, they declared that it made no difference whether a case might come before the court or not. In the matter of the Executive Communication, etc., 12 Fla. 653.

are responsible for two, on the authority of the leading Colorado case.¹⁴⁴ Apart from the lone Massachusetts opinion, then, there are just five unquestioned precedents in favor of this rule, two in Missouri and three in Colorado.¹⁴⁵ In both the Missouri cases the State's rights were clearly involved, a circumstance which is undoubtedly embarrassing to justices, whether with reason or not. The same is true of the third Colorado case, while the other two proceed upon the false hypothesis that advisory opinions are binding adjudications.

There is every reason, then, for rejecting the rule as here promulgated. There is no ground for it historically; the English judges at most attempted to draw the line at giving opinions in pending cases or criminal cases that were practically upon them. In an appeal from a Canadian advisory opinion, the Judicial Committee of the Privy Council gave their opinions on questions which might arise in litigated cases,¹⁴⁶ and the Canadian justices follow the same practice.¹⁴⁷ The United States practice furnishes little in favor of the rule and much against it. As in Massachusetts, so in the other States referred to above, it has been disregarded in so many opinions that space will not permit an enumeration. Finally, theoretical considerations are against it. The four arguments adduced under (a) *supra* are of equal force here, and may be supplemented by others. If it be claimed that the probability of future cases is a reason for refusal, an obvious reply is that an opinion from the justices will reduce such probability to a

¹⁴⁴ In re Construction of Constitution, 3 S. D. 548; and In re Board of Purchase and Supplies, etc., 37 Nebr. 425.

¹⁴⁵ In two instances where advice was sought under a statutory requirement, the rule was introduced as one reason for declining to comply. Hayburn's Case, 2 Dall. 409; and In the matter of the Application of the Senate, 10 Minn. 78.

¹⁴⁶ Attorney-General for Ontario v. Attorney-General for Dominion, et al., (1896) A. C. 348.

¹⁴⁷ In re References, etc., 43 Can. S. C. R. 536, approved in Attorney-General for Ontario v. Attorney-General for Canada, (1912) A. C. 571.

minimum, thus saving a great deal of litigation, while to the case that does survive the justices can still come absolutely free to change their minds upon further argument. But it need not be admitted that the probability that cases will arise is a reason for refusing advice. If the constitution plainly imposes a duty upon the justices to give their opinions upon certain kinds of questions coming from named sources, why should the probability of embarrassment to the justices or to private citizens, or of any other contingency, be an excuse for neglecting that duty? Under the American constitutional system, a department of the government is entitled to refuse performance of a task that is on its face within the duties imposed upon it by the constitution, only if its independence is threatened. The possibility of an interference with that independence "is such a remote hypothesis that it cannot form the basis of an argument for the non-performance of a duty."¹⁴⁸

If advisory opinions are not to be given when they touch upon private rights that may possibly come before the justices in regular judicial proceedings, it would seem to follow that existing statutes should not be construed or examined as to constitutionality, since future cases may very easily necessitate such a construction or examination. Yet only in one State have the justices taken this logical step.¹⁴⁹ Missouri and Florida (after 1875) should not be considered because of the

¹⁴⁸ H. A. Dubuque in *Am. L. Rev.* XXIV, p. 369, at p. 397.

¹⁴⁹ In two Massachusetts cases, the justices suggest that if a question calls for the construction of a statute under which private rights may have arisen, they will be particularly careful to see that the question falls within the advisory opinion clause; in both, opinions were refused because there was no solemn occasion. *Functions of Judiciary*, 148 Mass. 623; and *In re Power of Legislature to Require Opinion*, 150 Mass. 598. It is submitted that insofar as the partial refusal of *In re Opinion of the Justices*, 115 N. E. 921 (Mass.) is rested upon the rule against construction of existing statutes, the authorities referred to by the justices do not bear out their assertion that this rule "has been said in numerous opinions . . . to be sufficient to require them to decline to express an opinion."

word "constitutional" in their advisory opinion provisions. Still it may be mentioned in passing that the interpretation of this in Missouri was very narrow. It was announced *obiter* in Advisory Constitutional Opinion, etc., 37 Missouri 135: questions of constitutional law meant questions which arise upon the constitution alone, i.e., "some question of the proper construction and true meaning of some provision, clause or words contained in the Constitution." Now it is obvious that the determination of the constitutionality of a statute will generally depend upon the true meaning of words or phrases in the constitution, and in fact twice the Missouri justices passed upon the constitutionality of statutes extra-judicially.¹⁵⁰ But they refused to do so in 1874¹⁵¹ and declared it was their province to give an opinion as to the constitutionality of an act only when the question of validity was raised in a regular case. In Florida the justices have consistently refused to give opinions upon questions dealing with executive powers or duties under existing statutes,¹⁵² with the possible exception of *In re Opinion of the Justices*, 68 Florida, 560.

It was reserved for the Colorado practice to develop the rule that completed legislation should not be construed or its constitutionality considered in advisory opinions. It is found first as a *dictum* in that same all-comprehensive case of 1889.¹⁵³ "Executive questions must be exclusively *juris publici*, and . . . legislative questions must be connected with pending legislation, and relate either to the constitutionality thereof or to matters connected therewith of purely public right." The first part of the delimitation, relating to the executive,

¹⁵⁰ Advisory Constitutional Opin., etc., 37 Mo. 139; and Opin. of Supreme Court Judges, etc., 55 Mo. 295.

¹⁵¹ In the matter of Inquiries Submitted, etc., 58 Mo. 369.

¹⁵² In re Opin. of Supreme Court, 39 Fla. 397; Advisory Opin. to the Governor, 50 Fla. 169; In re Opin. of Justices, 54 Fla. 136; In re Opin. of Judges, 62 Fla. 4; In re Advisory Opin. to the Governor, 64 Fla. 1; In re Opin.s of the Justices, 69 Fla. 632; and In re Opin. of the Justices, 69 Fla. 653.

¹⁵³ In the matter of the Constitutionality of SB. No. 65, 12 Colo. 466.

will be taken up a little later. The argument for the second was that the legislative history of the State before the advisory opinion was introduced made it clear that "the primary and principal purpose of the amendment" was to enable the general assembly to avoid the "injurious consequences arising from unconstitutional legislation;" and that this is corroborated by the fact that the general assembly of 1887 propounded only questions as to the constitutionality of pending bills. There are two objections to this. In the first place, it is submitted that such criteria of interpretation should only be employed when the words of the amendment are ambiguous, and then only to decide between two possible meanings, never to supplement or modify express provisions.¹⁵⁴ The natural and ordinary meaning of words should prevail, if possible.¹⁵⁵ But, secondly, even if this is a case where history and contemporary circumstances may legitimately be resorted to, the conclusion of the justices cannot be supported. The history of the advisory opinion itself should be consulted. It was not by accident that the framers of the amendment employed the well-established New England phraseology, which had itself been largely derived from the earlier English practice. Is it not reasonable to suppose, when legislators use a "phrase consacrée," a particular and unusual assemblage of words which have been for a century attached to a single institution, that they intended to transfer that institution to their own system? Why, then, if history was to guide their interpretation, did not the justices endeavor to search out the characteristics of the advisory opinion as it existed when it was incorporated into the Colorado constitution? If the general assembly of 1885 had wished to limit their privilege of extra-judicial consultation to questions touching pending legislation, they could certainly have found words and phrases more clearly

¹⁵⁴ Cf. Willoughby, Const., I, p. 33; Story on the Const., s. 407; and Cooley, Constitutional Law, p. 388.

¹⁵⁵ Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. 1, at p. 188.

expressing that intention than those appearing in the amendment, which, indeed, on the surface suggest no ambiguity at all. The argument from contemporary construction is meaningless, for the majority of inquiries from legislatures in any State naturally are connected with pending legislation.

After this dictum of 1889, the Colorado cases on existing statutes are irreconcilable. Before that time there had been four opinions in which existing legislation was construed,¹⁵⁶ in every instance it is true that there had been no chance for private rights to arise under the statutes, but this point is not mentioned. However, the same course is followed in four cases of a later date as well.¹⁵⁷ The seed sown in 1889 first bore fruit in 1891. The house asked whether the State treasurer could credit county treasurers with moneys paid out by them as scalp bounties under an act of 1889 and whether the present State treasurer was entitled to an increase in salary provided for by an act of 1891.¹⁵⁸ Here it was clear that private rights had arisen under existing laws, and for that reason an answer was refused, on the authority of *In the matter of the Constitutionality of SB. No. 65, 12 Colorado, 466 (!)*. This was followed, under similar circumstances, in four cases,¹⁵⁹ in the first of which an actual litigation at an early date seemed quite probable, and an opinion would have been *ex parte*. In another refusal, the court said private rights "may have arisen or attached which should not be determined (!) in a purely *ex parte* proceeding," and then added that, "so far as the validity of legislation is involved, in response to legislative questions, it is confined to proposed acts, in order that unconstitutional legis-

¹⁵⁶ *In re Election of District Judges*, 11 Colo. 373; *In re SR. Relating to SB. No. 45*, 12 Colo. 339; *In re HR. Relating to HB. No. 218*, 12 Colo. 359; and *In re Question Propounded by the Governor*, 12 Colo. 399.

¹⁵⁷ *In re General Appropriation Bill*, 16 Colo. 539; *In re Contracting of State Debt by Loan*, 21 Colo. 399; *In re Casual Deficiency*, 21 Colo. 403; and *In re Questions of the Governor*, 55 Colo. 17.

¹⁵⁸ *In re HR. No. 25*, 15 Colo. 602.

¹⁵⁹ *In re Penitentiary Commissioners*, 19 Colo. 409; *In re Appointments*

lation may be avoided, and cannot call for a construction of acts already passed."¹⁶⁰ Here the rule is laid down quite badly (though *obiter*) altogether apart from questions of private rights.¹⁶¹ The question of private rights and the construction of existing statutes are plainly associated in the most recent refusal of the Colorado justices,¹⁶² but, curiously enough, none of the above cases is mentioned, and the doctrine is rested upon 33 Colorado, 307 (!). It is impossible to say whether or not this alleged rule was responsible for this refusal, for the justices also objected to the absence of any pending bill, on the insecure authority of 12 Colorado, 466. On the other hand, statutes have been construed even where it is almost certain that private rights must have arisen, once in a special exigency, with a warning that it was not a precedent,¹⁶³ five times with no reservations at all.¹⁶⁴ Also in two instances, the justices stated general principles leaving the interrogator to apply them to particular statutes.¹⁶⁵

Thus it appears that even in Colorado the weight of precedent is against the rule, though it might be replied that in the

by the Governor, etc., 21 Colo. 14; In re Constitutionality of SB. No. 196, 23 Colo. 508; and In re Leasing of State Lands, 27 Colo. 99.

¹⁶⁰ In re SR. No. 4, 54 Colo. 262.

¹⁶¹ So too in In re University Fund, 18 Colo. 398.

¹⁶² In re Interrogatories of the House, 162 Pac. 1144.

¹⁶³ "But inasmuch as the rights of the public are involved, and the interests of the State institutions concerned are so vitally affected, and the results to them would be so disastrous were the answer, which we feel constrained to give, withheld until after the present session of the legislature, we have concluded to depart from such practice and answer the question submitted. This, however, must not be taken as a precedent for the right in general of the legislature to ask for information as to the constitutionality of an existing act."—In re Constitutionality of an Act, 21 Colo. 46.

¹⁶⁴ In re Board of Capitol Commissioners, 18 Colo. 220; In re Leasing of State Lands, 18 Colo. 359; In re Certificates of Indebtedness, 18 Colo. 566; In re Canal Certificates, 19 Colo. 63; and In re Questions by the Governor, 55 Colo. 105.

¹⁶⁵ In re Appropriations by General Assembly, 13 Colo. 316; and In re Continuing Appropriations, 18 Colo. 192 (here a case was pending in the supreme court.)

cases where opinions were given, the rule was simply waived, not rejected. But in other States, the practice is overwhelmingly against it. In Massachusetts, New Hampshire, Maine, Rhode Island and South Dakota, there have been ninety-seven opinions where the construction of existing statutes was called for, and not once has this been alleged as a reason for withholding advice. The same is true of six extra-constitutional opinions.¹⁶⁶ The rule had no place in the English practice,¹⁶⁷ and existing legislation is explicitly mentioned in the Canadian advisory opinion statutes.¹⁶⁸

In theory, too, the rule is unsound. If the possibility that private rights will accrue under a statute is a good reason for declining to construe it in an advisory capacity, it is not perceived why pending legislation should not fall under the ban. Why should an opinion of a particular provision, pronounced after its enactment, give any more trouble to a judge or result in any greater prejudice to private rights than if it were pronounced before its enactment? As a matter of policy, if the justices can eliminate a great deal of litigation in advance, by indicating their expert views on legislative acts, why should they not do so? Why should it be necessary for the people to run the risk of error in matters that often are not settled for years after a statute is passed?¹⁶⁹ But, we are reminded, extra-judicial opinions would not settle these questions anyway,

¹⁶⁶ Opin. of the Judges, etc., 30 Conn. 591; *In re Babcock*, 21 Nebr. 500; *In re Appropriations for Deputies, etc.*, 25 Nebr. 662; *In re Quaere, etc.*, 31 Nebr. 262; *In re Board of Purchase and Supplies, etc.*, 37 Nebr. 425; and Opin. of the Judges, etc., 37 Vt. 665.

¹⁶⁷ Macqueen, House of Lords, p. 53; cf. opinions of the Lords in *McNaghten's Case*, 10 Cl. and Fin., 200.

¹⁶⁸ Nearly all the Canadian opinions involve the construction of statutes.

¹⁶⁹ "It may be thought, and the impression will be confirmed when we consider as well the minuteness of the State Constitutions as the profusion of State legislation and the inconsiderate haste with which it is passed, that as the risk of a conflict between the Constitution and statutes is great, so the inconveniences of a system under which the citizens cannot tell whether their obedience is or is not due to a statute must be serious.

since they have no binding force. That is true, but they would measurably diminish the chance of error, for, as a rule, they are remarkably sound; as will be seen,¹⁷⁰ they are commonly cited in regular cases, and have rarely been overruled in later cases dealing with the same subject matter. It might be added that even the regular decisions of our supreme courts do not irrevocably *settle* questions of law, for they are occasionally rejected by a later court. Again, not only is it possible that years may pass before the judicial attitude towards particular statutes is ascertained in the ordinary course of events,¹⁷¹ but there are many questions which it is quite difficult to get before the courts in litigated cases at all. Finally, it may be added, that in so far as the rule is defended on the ground of an alleged interference with private rights, the arguments already urged against the *ex parte* objection are in point.

(e) *Questions referred by the legislature for advisory opinions must be publici juris.* (?) This, too, is a rule which is practically limited to the Colorado practice. There are but two vague suggestions of it in other States. In the earliest New Hampshire

How is a man to know whether he has really acquired a right under a statute? How is he to learn whether to conform his conduct to it or not? How is an investor to judge if he may safely lend money which a statute has empowered a community to borrow, when the statute may be itself subsequently overthrown?"—Bryce, *Amer. Commonwealth*, Pt. II, Ch. 37.

¹⁷⁰ See pp. 234-236 *infra*.

¹⁷¹ "To settle at once and forever a disputed point of constitutional law would often be a gain both to private citizens and to the organs of the government. Under the present system there is no certainty when, if ever, such a point will be settled. Nobody may care to incur the trouble and expense of taking it before the court. A suit which raises it may be compromised or dropped. When such a question, after perhaps the lapse of years, comes before the supreme court and is determined, the determination may be different from what the legal profession has expected, may alter that which has been believed to be the law, may shake or overthrow private interests based upon views now declared to be erroneous."—Bryce, *Amer. Commonwealth*, I, p. 352.

case,¹⁷² the justices said: "We are inclined to believe that the constitution of this state did not contemplate that the opinion of the justices of the superior court should be required upon a mere question of right between the legislature and individuals, but upon important questions of a nature altogether public." But they were embarrassed here by the *ex parte* nature of the inquiry, and there are many later New Hampshire opinions upon questions by no means altogether public in their nature. A question almost identical with that in 62 New Hampshire, 704, was referred to the Missouri justices in 1865;¹⁷³ an opinion was refused for the reason that the question was too vague and general, but the justices seized the opportunity to announce that "questions should be important in reference to the public interest." As in New Hampshire, the test was not observed in later cases, and was not mentioned again in this form.

The cause for its appearance in Colorado is not far to seek. Unfortunately, the advisory opinion was incorporated into the constitution as an amendment to the article which gave the supreme court "power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunction, and other original and remedial writs." The court had already held that this original jurisdiction of the court should only be used in cases involving questions *publici juris*, i.e., "where the interest of the state at large is directly involved; where its sovereignty is violated, or the liberty of its citizens menaced; where the usurpation or the illegal use of its prerogatives or franchises is the principal, and not a collateral, question."¹⁷⁴ In the 1889 case to which we have so often referred,¹⁷⁵ Helm, C. J., began his exposition of the advisory opinion clause by saying it was merely an enlargement of the original jurisdiction granted in Article VI, section 3, in the first place, adding to the list of

¹⁷² Opin. of the Court, 62 N. H. 704.

¹⁷³ Advisory Constitutional Opinion, etc., 37 Mo. 135.

¹⁷⁴ Wheeler v. No. Colo. Irr. Co., 9 Colo. 248.

¹⁷⁵ In the matter of the Constitutionality of SB. No. 65, 12 Colo. 466.

writs there specified "an unique and important proceeding." Referring to *Wheeler v. Northern Colorado Irrigation Company*, he continued: "All of the reasons relied upon for confining the writs specified in section 3 of Article VI to questions *publici juris* apply with even greater force to the novel proceeding authorized by the provision before us; for, while this proceeding is original, and in that respect similar to the other original proceedings referred to, yet it possesses characteristics peculiar to itself. Not only should its operation be confined to questions *publici juris*, but, as we shall endeavor to show, even questions of this character should rarely be presented or considered. It will be observed that the authority conferred is accompanied by an express limitation. While the question must be one relating to purely public rights, it can only be propounded upon solemn occasions, and it must possess a peculiar or inherent importance not belonging to all questions of the kind." Finally he stated the rule: "We are of the opinion that executive questions must be exclusively *juris publici*, and that legislative questions must be connected with pending legislation, and relate either to the constitutionality thereof or to matters connected therewith of purely public right." The court has in effect interpolated the phrase "*publici juris*" into a sentence that is perfectly clear and reasonable without it. It is a clear case of judicial legislation. It would be as reasonable to argue that, because the advisory opinion requirement is, in Rhode Island, included in the same section with a provision for the instruction of juries, therefore the advisory opinion practice should be limited by the doctrines of the law of jury instruction. The advisory opinion clause was placed in Article VI, section 3, of the Colorado constitution for the obvious reason that it provided for the exercise of an original jurisdiction, and that section is the only section dealing with original jurisdiction. It is true that it is an enlargement of original jurisdiction, but why does it follow that it is an enlargement of the particular original jurisdiction already granted and is sub-

ject to all the constitutional and judicial restrictions imposed thereon?

A cursory examination of the Colorado opinions will show that there has been no consistent conformity to the rule. Many times advice has been given on questions that are far from satisfying the definition of matters *publici juris* given in *Wheeler v. Northern Colorado Irrigation Company*, 9 Colorado, 248. However, the test has been applied several times,¹⁷⁶ and has in three instances possibly brought about refusals.¹⁷⁷ In these latter cases, other reasons are also assigned for an unwillingness to advise, so that it is doubtful whether there is a single precedent since *In the matter of the Constitutionality of SB. No. 65*, 12 Colo. 466, which unquestionably supports the rule.

4. *It is not necessary that questions referred for advisory opinions should be of a judicial nature.*

The contrary was asserted *obiter* in a single Missouri case of 1865: "It must be in its own nature, a judicial question, the final determination of which, by the organic frame of our Government, properly belongs to the Judiciary."¹⁷⁸ But this cannot be right; all questions of law are not questions which the judiciary can finally decide. The other two departments are entrusted with the determination of many questions of a legal nature, and if the constitution permits them to seek the assistance of the judges in dealing with these questions, it is not admissible to add the qualification quoted above. There is undoubted authority for the rule in Massachusetts and New Hampshire. In 1878, the Massachusetts justices were asked to advise as to the power of the senate to originate

¹⁷⁶ *In re Funding of County Indebtedness*, 15 Colo. 421; *In re Speakership*, etc., 15 Colo. 520; and *In re SR. No. 10*, etc., 33 Colo. 307.

¹⁷⁷ *In re HB. No. 99*, etc., 26 Colo. 140; *In re SB. No. 27*, etc., 28 Colo. 359; and *In re Interrogatories of the Senate*, 54 Colo. 166.

¹⁷⁸ *Advisory Constitutional Opinion*, etc., 37 Mo. 135.

appropriation bills.¹⁷⁹ This was certainly a question not within the jurisdiction of the justices, but, after a careful review of the precedents in England and Massachusetts, they concluded that "it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity," and gave the opinion requested. The New Hampshire case involved the power of a legislature to elect a United States senator,¹⁸⁰ a power plainly beyond judicial control; but an answer was given and the Massachusetts case cited with approval. There are scores of cases where opinions were rendered unquestioningly on similar matters.

5. *The lack of legal assistance is not sufficient excuse for declining to give advisory opinions.*

Often the justices of our supreme courts have deplored the fact that, in exercising the advisory function, they did not enjoy the valuable assistance of professional briefs and argument. They have referred to this deprivation as a reason why advisory opinions should not be binding upon them but should always be open to reconsideration,¹⁸¹ as a reason for caution in giving such opinions only when necessary,¹⁸² and as a reason why the conclusions in advisory opinions are entitled to less respect than those reached in regular cases,¹⁸³ or are more subject to error.¹⁸⁴ In no case has a refusal been based upon it; but the

¹⁷⁹ Opin. of the Justices, 126 Mass. 557.

¹⁸⁰ Opin. of the Court, 60 N. H. 585.

¹⁸¹ *Green v. Commonwealth*, 12 Allen, 155; Opin. of the Justices, etc., 25 N. H. 537; *In re Opin. of the Justices*, 76 N. H. 597; Opin. of the Justices, 58 Me. 590; and *Taylor v. Place*, 4 R. I. 324.

¹⁸² *In re Bounties to Veterans*, 186 Mass. 603; *In re Opin. of the Justices*, 190 Mass. 611; *In the matter of Senate Resolution on the Subject of Irrigation*, 9 Colo. 620; *In re Construction of Constitution*, 3 S. D. 548; and *In re Board of Purchase and Supplies*, etc., 37 Nebr. 425.

¹⁸³ Opin. of the Justices, 16 Me. 479.

¹⁸⁴ *In the matter of the Constitutionality of SB. No. 65*, 12 Colo. 466; *In re Appropriations by General Assembly*, 13 Colo. 316; and *In re Railroad Commissioners*, 15 Nebr. 679.

complaint itself is unnecessary. The justices are not prevented from requesting argument by the counsel of parties interested. In fact we have seen that they have often heard such arguments.¹⁸⁵ Also, they can surely command the assistance of *amici curiae* in time of need. This has been done in New Hampshire¹⁸⁶ and Nebraska,¹⁸⁷ and is a very common practice in Colorado,¹⁸⁸ where it is an important factor in many opinions.¹⁸⁹ In one instance an opinion was refused partly because the time permitted was insufficient for full argument and consideration.¹⁹⁰ It is scarcely true then, as stated by a Massachusetts justice,¹⁹¹ that the justices are *necessarily* without legal aid, or that "It is impossible that there should be an argument."¹⁹²

6. *The importance of a question and the solemnity of an occasion are relative matters depending upon the circumstances of each particular interrogatory.*

The assumption of a discretion to refuse advisory opinions if the reference did not disclose an important question and were not made upon a solemn occasion,¹⁹³ called for the development

¹⁸⁵ See pp. 190-192 *supra*.

¹⁸⁶ Opin. of the Justices, 53 N. H. 640.

¹⁸⁷ In re Senate File 31, 25 Nebr. 864; and In re House Roll 284, 31 Nebr. 505.

¹⁸⁸ *Amici curiae* have appeared in at least forty-one cases to date.

¹⁸⁹ Cf. the words of Hayt, C. J., in *Parks v. Soldiers' and Sailors' Home*, 22 Colo. 86: "As some of the opinions to which reference has been made were delivered in answer to questions propounded by the executive, it is perhaps well to say, in passing, that it must not be assumed for this reason that full argument was not heard by the court, or that the opinions were pronounced except upon the most careful consideration. . . . No cause which has been determined by this court in recent years has received more serious consideration than did the examination of those interrogatories propounded by the executive."

¹⁹⁰ In re SB. No. 416, 45 Colo. 394.

¹⁹¹ In re Opin. of the Justices, 190 Mass. 611.

¹⁹² Story, J., in Deb. Mass. Conv. 1820, p. 489.

¹⁹³ See pp. 168-176 *supra*.

of rules for testing importance and solemnity. Only one such rule has found much favor (see next section). The justices soon admitted that it was difficult to generalize, to frame a definition "which will fully cover every case which may arise,"¹⁹⁴ and began to test each case on its merits. So the only tangible harvest from the refusals founded on this discretion is a collection of paraphrases¹⁹⁵ and the rule which follows. This state of affairs in itself is an argument against the right of the judges to pass upon the meaning of the phrases in question; for the failure to establish definite rules leaves the other departments completely at a loss to know when they can obtain extra-judicial counsel and when not—one constitutionally authorized to receive advice may be denied it almost at the whim of the adviser. If it is true that the importance of a question and the solemnity of an occasion are relative matters, surely the facts upon which they depend are within the knowledge of the questioner rather than the questioned.

7. *The possibility of immediate executive or legislative action on the questions referred is not a necessary prerequisite for advisory opinions.*

Proceeding upon the hypothesis that they are free to refuse advisory opinions, if in their judgment the question is not important or if the occasion lacks the proper solemnity, the justices of some States have developed the rule that the occasion of a reference cannot be solemn, within the meaning of the constitution, unless an answer will be of use in a pending matter. Others have said the importance of a question depended upon

¹⁹⁴ Functions of Judiciary, 148 Mass. 623; Opin.s of the Justices, 95 Me. 564; Opin. of the Court, etc., 55 Mo. 497; In the matter of the Constitutionality of SB. No. 65, 12 Colo. 466; and In re Chapter 6, Sess. L. 1890, 8 S. D. 274.

¹⁹⁵ E.g. "solemn occasion" means some serious and unusual exigency—Functions of Judiciary, 148 Mass. 623; "important question and solemn occasion" calls for some question of unusual magnitude and solemn concern for the public good—Advisory Constitutional Opinion, etc., 37 Mo. 135.

the same condition. In the application of this general test, three particular rules have been evolved.

(a) *The question must be one "which the body making the inquiry has occasion to consider in the exercise of the legislative or executive powers entrusted to them respectively."*¹⁹⁶ (?) This was quoted with approval, though *obiter*, in Opinion of the Justices, 126 Massachusetts, 557. Later it was rephrased and applied to "questions propounded with a view to further legislation on the subject matter of the statutes . . . referred to."¹⁹⁷ We have already noted that this refusal evoked an emphatic protest from the house of representatives and was generally disapproved.¹⁹⁸ Nevertheless, the Massachusetts justices continued to apply the test to questions both from the legislature¹⁹⁹ and from the governor and council,²⁰⁰ and in two instances withheld opinions when the questions failed to measure up to the test.²⁰¹ Two refusals have been due to the same test in New Hampshire,²⁰² while it was applied with results favorable to the interrogator in a few other cases.²⁰³ It appeared in that State in a milder form than in Massachusetts, the justices indicating²⁰⁴ that if a question submitted did not have

¹⁹⁶ Opin. of the Justices, 122 Mass. 600.

¹⁹⁷ "By a solemn occasion the constitution means some serious and unusual exigency. It has been held to be such an exigency when the governor or either branch of the legislature having some action in view has serious doubts as to their power and authority to take such action under the constitution, or under existing statutes."—Functions of Judiciary, 148 Mass. 623.

¹⁹⁸ See p. 170 *supra*.

¹⁹⁹ In re Opin. of the Justices, 190 Mass. 611; and In re Opin. of the Justices, 211 Mass. 608.

²⁰⁰ In re Opin. of the Justices, 216 Mass. 605.

²⁰¹ In re Opin. of the Justices, etc., 208 Mass. 614; and In re Opin. of the Justices, 211 Mass. 630.

²⁰² Opin. of the Justices, 67 N. H. 601; and In re Opin. of the Justices, 76 N. H. 597.

²⁰³ In re Opin. of the Justices, 73 N. H. 625; and In re Opin. of the Justices, 74 N. H. 606.

²⁰⁴ Opin. of the Court, 60 N. H. 585.

to be determined in the performance of legislative or executive duties, this was *evidence* that it was not an important question. Again, in 1906,²⁰⁵ they stated that it was sufficient if the interrogator *may* be called upon to act in matters necessarily involving the question. Also, in applying the test, they have displayed a good deal of laxity, sometimes *presuming* an intention to take official action when the inquiry disclosed no such intention.²⁰⁶ The same course has been pursued in Massachusetts as well.²⁰⁷ Nowhere else has the test, expressed in such general terms, found a foothold, though there are a few *dicta* in its favor. In Statement and Questions Submitted, etc., 70 Maine, 600, the justices, referring to an earlier case, say: "To put such questions, in the absence of facts requiring their solution, would be an abuse of the power of an executive to call for the opinion of the court upon questions of law, on solemn occasions." But they were laboring under the impression²⁰⁸ that the governor was bound to follow their advice.²⁰⁹ There is also a minority approval of Opinion of the Justices, 122 Massachusetts, 600, (not resulting in a refusal, however) in Question Submitted, etc., 72 Maine, 542. Finally the test is enunciated *obiter* in Advisory Constitutional Opinion, etc., 37 Missouri, 135.

(b) *Legislative questions must be connected with a pending bill.* (?) This constriction of the test is peculiar to Colorado, and the test appears in no other form in that State. The germ of it is probably the statement in In the matter of Senate Resolution on the Subject of Irrigation, 9 Colorado, 620, that the purpose of the advisory opinion amendment could not have

²⁰⁵ In re Opin. of the Justices, 73 N. H. 621.

²⁰⁶ Opin. of the Justices, 72 N. H. 601; Opin. of the Justices, 72 N. H. 605; and In re Opin. of the Justices, 75 N. H. 613.

²⁰⁷ In re Opin. of the Justices, 190 Mass. 611; In re Opin. of the Justices, 211 Mass. 608; and In re Opin. of the Justices, 216 Mass. 605.

²⁰⁸ Statement and Questions Submitted, etc., 70 Me. 570.

²⁰⁹ The same is true in In re HR. No. 30, 10 S. D. 249.

been "to exact in response to a legislative inquiry a wholesale exposition of all constitutional provisions relating to a given general subject, in anticipation of the possible introduction or passage of measures bearing upon particular branches of such subject." The justices went on to say that the matters mentioned did not appear to be covered by any pending acts and that they were involved in cases then before the courts. This was a perfectly sound reason for the refusal; but that these same justices did not intend to make the existence of a pending bill an absolute test for legislative inquiries may be seen from their replies in other cases where no bills were pending.²¹⁰ Yet it was quoted as an absolute test in 1888,²¹¹ though the existence of a pending bill was assumed in that case.²¹² Stated in this form, it was incorporated in Helm, C. J.,'s sweeping exposition of the advisory clause in *In the matter of the Constitutionality of SB. No. 65*, 12 Colorado, 466, and so into the later practice. This rule, too, was bolstered up by a reference to the assumed intention of the framers of the amendment and to the contemporary practice. The latter argument is far from convincing here, for of the seventeen questions referred by the legislature of 1887, six were not connected with pending bills, and only one was denied an answer (on other grounds at that). The test is reasserted in seven or eight later cases, but wherever it is attended by a refusal, other reasons are also given.²¹³ It has been stretched to mean that there must be a strong probability that the bill will pass as submitted to the supreme court,²¹⁴

²¹⁰ *In the matter of Senate Resolutions, etc.*, 9 Colo. 626; *In the matter of House Resolution, etc.*, 9 Colo. 622; *In re Senate Resolution, etc.*, 9 Colo. 630; and *Veto Power*, 9 Colo. 642.

²¹¹ The only justice left over from the 1887 court was Helm who had now become chief justice.

²¹² *In re SR. Relating to Internal Improvement Fund, etc.*, 12 Colo. 285.

²¹³ *In re a Bill, etc.*, 21 Colo. 29; *In re Bill, etc.*, 23 Colo. 504; *In re HB. No. 495, etc.*, 26 Colo. 182; *In re SR. No. 7*, 29 Colo. 350; *In re SB. No. 416*, 45 Colo. 394; and *In re SR. No. 4*, 54 Colo. 262; *In re Interrogatories of the House*, 162 Pac. 1144.

²¹⁴ *In re a Bill, etc.*, 21 Colo. 29.

and then that it must have at least passed the house in committee of the whole or on a second reading,²¹⁵ and that further amendments are not in contemplation.²¹⁶ On the other hand an opinion has been refused after the bill has passed the third reading.²¹⁷ If all these limitations were accepted as valid, legislative questions could be put only when bills had reached their final form and were practically certain of passing upon the third reading if the constitutionality were approved by the supreme court. This may or may not be desirable, but it is certainly difficult to start from the advisory opinion clause and reach such a conclusion. Not only is there no clear-cut precedent in Colorado for test (b), but many times the justices have answered legislative inquiries that were not within the test, and without demurring.²¹⁸ There is a single case in Massachusetts where this same test was suggested, the justices stating that "a definite enactment to a specific end must be under serious consideration before it can be said that a 'solemn occasion' has been presented within the meaning of those words in the Constitution."²¹⁹ But here the real reason for declining an answer was that the questions were too general, calling "in substance for an exposition of the Constitution relating to the powers of taxation." The situation is quite similar to that in In the matter of Senate Resolution on the Subject of Irrigation, 9 Colorado, 620, except that there is no mention of pending cases.

²¹⁵ In re Bill, etc., 23 Colo. 504; In re HB. No. 495, 26 Colo. 182; and In re SR. No. 7, 29 Colo. 350.

²¹⁶ In re Bill, etc., 23 Colo. 504.

²¹⁷ In re SB. No. 416, 45 Colo. 394; cf. In re Senate Resolution, etc., 9 Colo. 630, and In re Consolidation of School Districts, 23 Colo. 499.

²¹⁸ In addition to the 1887 cases cited in note 210 *supra*, cf. In the matter of House Resolution, etc., 12 Colo. 186; In re Senate Resolution, etc., 12 Colo. 187; In re HR. No. 25, 15 Colo. 602; In re Emergency Clause, 18 Colo. 291; In re Consolidation of School Districts, 23 Colo. 499; and In re SR. No. 10, etc., 33 Colo. 307.

²¹⁹ In re Opin. of the Justices, 217 Mass. 607. The recent refusal of In re Opin. of the Justices, 115 N. E. 921 (Mass.), was based in part upon the rule we are now considering.

(c) *Opinions will not be given after the adjournment of the interrogating legislature or the end of the term of the interrogating executive.* (?) There is practically just one authority for this proposition—an executive reference in New Hampshire.²²⁰ It was asserted for the legislature in *Opinions of the Justices*, 95 Maine, 564,²²¹ but there was a cogent dissenting opinion in that instance, the justices pointing out that this was a novel doctrine, that it was often necessary and practical for legislatures to obtain opinions beforehand so as to avoid errors,²²² and that many opinions had been returned after an adjournment.²²³ The majority doctrine may perhaps be regarded as superseded by *In re Opinion of the Justices*, 103 Maine, 506.

There are, then, only six cases (three in Massachusetts and three in New Hampshire) where it is clear that a refusal was based upon the tests we are considering. Apart from the scores of cases where advice would have been replaced by non-compliance had the tests been applied, there are also instances where the justices have openly objected to the tests, though it be only in minor opinions. In *In re Interrogatories of the Senate*, 54 Colorado, 166, Hill, J., and Scott, J., insisted that the reference was well within the constitution, although no pending bill was involved. And in *Opinions of the Justices*, 95 Maine, 564, the three dissenting justices argued very forcibly against the whole doctrine that an opinion may be refused

²²⁰ *Opin. of the Justices*, 70 N. H. 640.

²²¹ In *In re State Taxation*, 97 Me. 595, the same justices distinguished between the recess separating the sessions of a legislature and the interim between two legislatures.

²²² Even in regular cases the New York judges have given decisions that could not affect the particular case, "to prevent embarrassment in the future."—*Matter of Madden*, 148 N. Y. 136; and *Matter of Fairchild*, 151 N. H. 359. But they will not do so unless the question is of general interest and importance.—*Matter of Norton*, 158 N. Y. 130.

²²³ See list given there; also *Opin.s of the Justices*, etc., 68 Me. 589; *Veto Power*, 9 Colo. 642; and *In the matter of the Constitutionality of SB. No. 65*, 12 Colo. 466.

unless the interrogator "has occasion to consider and act upon the questions submitted," as well as against the right of the justices to pass finally upon the solemnity of an occasion. As to the first point at any rate, the contrary argument of Savage, J., was rejected in *In re Opinion of the Justices*, 103 Maine, 506. So that, even if we admit the discretion claimed by some justices, it is decidedly doubtful whether the single rule they have evolved in the exercise of that discretion can be supported.

We do not mean for a moment to suggest that questions having no relation whatever to legislative or executive powers and duties are reasonably within the scope of the clause. There is no reason, however, why they should necessarily relate only to powers and duties of which the immediate exercise is contemplated. Legal advice may be indispensable in the formulation of a plan that may not call for final action for some time, if unnecessary labors and errors are to be avoided. Information as to the state of the law on a particular point may conceivably be of use to the legislators at any time, for they "may be called on . . . to change the law."²²⁴ Nevertheless, it is perfectly true that, in general, questions should be connected with matters where action is at least in the contemplation of the questioner. It would be in violation, both of common sense and of good governmental policy to make the justices a consulting board on any and all abstract questions of an encyclopedic nature. Still the enforcement of this obvious restriction should be in the hands, not of the justices, but of the people. The executive and legislative departments will not often exceed the bounds of reason, and, as many cases testify, will usually yield gracefully to representations from the judiciary that the reference is not expedient, and withdraw the questions. But if they do prove unreasonable and intractable, the remedy is not to place advisory opinions at the mercy of the advisers, but to change the personnel of the other departments or introduce definite and plain restrictions into the constitutional clause.

²²⁴ *McNaghten's Case*, 10 Cl. and Fin., 200.

8. *Opinions may be refused if the reference does not indicate with sufficient definiteness the particular points upon which information is desired.*

The justification for this is not to be found in constitutional interpretation. It is a purely practical matter. The physical abilities of human beings are obviously limited. One man can do so much and no more. It would be impossible for judges to give a proper attention to their regular judicial duties and at the same time indulge in the general discussion of abstract or hypothetical questions from an academic standpoint. Then, too, questions may be logically unanswerable because of vagueness. If information is desired in connection with a pending bill, it would seem the part of good sense, and is indeed the common practice, to enclose a copy of the bill.

The judges have shown a very patient consideration in this matter. There are only six cases where a refusal has been blamed, even in part, on the general or indefinite nature of the questions, and the excuse is quite admissible in every instance.²²⁵ Thus in *Opinion of the Justices, etc.*, 145 Massachusetts, 587, the governor and council asked whether a set of rules submitted for their approval by the civil service commissioners would be valid, and the justices replied: "We have doubts whether, within the fair intent of the constitution, the executive or legislative departments can submit to the justices a law or a series of laws or rules more or less complicated and ask them to examine and ascertain what questions can be raised as to the validity of every clause, and to express an opinion in advance upon every such question." Again, in 1912,²²⁶ the council referred this question: "When the law calls for action 'by the Governor and Council,' is the Governor to concur with a majority of the Council in order to make its decisions effective, or is he to be considered a member of the deciding body with

²²⁵ Cf. also *Attorney-General for Ontario v. Hamilton Street Ry. Co.*, et al., (1903) A. C. 524.

²²⁶ In re *Opin. of the Justices*, 211 Mass. 630.

one vote?" An opinion was not given because "it is impossible to determine from your question whether the pending matter is of such a character that we ought to answer." Two years later the legislature was refused a general "exposition of the Constitution relating to the powers of taxation," because "an academic discussion of constitutional principles upon a subject so fundamental as that of taxation cannot be required."²²⁷ A fourth refusal may be found in a Missouri case²²⁸ in which the legislature submitted "general, vague and undefined" questions concerning legislative powers over corporations. The other two refusals were in Colorado and were occasioned by general questions as to whether certain bills were constitutional.²²⁹

It is clear from the precedents that if the justices are inclined to deal generously with abstract or indefinite inquiries, they may follow one of three plans. They may render an opinion drawn up in general terms, leaving it to the questioner to make the application to the particular case²³⁰ or they may request that copies of the pending bills involved be sent to them,²³¹ or that the exact points upon which advice is desired, be indicated in a supplementary communication.²³² Finally they may draw their own conclusions as to the particulars in which the interrogator is interested and submit an opinion

²²⁷ In re Opin. of the Justices, 217 Mass. 607.

²²⁸ Advisory Constitutional Opin., etc., 37 Mo. 135.

²²⁹ In re HB. No. 107, 21 Colo. 32; and In re SR. No. 7, etc., 29 Colo. 350 (another excuse was also given in this case).

²³⁰ Opin. of the Justices, 53 N. H. 634; In re Opin. of the Justices, 73 N. H. 618; In re Opin. of the Justices, 77 N. H. 611; In re SB. Providing for a Board of Public Works, etc., 12 Colo. 188; In re University Fund, 18 Colo. 398; In re Internal Improvements, 18 Colo. 317; and In re Bill, etc., 23 Colo. 504; cf. In re Ontario Medical Act, 13 Ont. L. R. 501.

²³¹ Opin. of the Justices, 126 Mass. 557; and In the matter of the Constitutionality of HB. No. 18, etc., 9 Colo. 623.

²³² In the matter of the Constitutionality of HB. No. 18, etc., 9 Colo. 623; In re HB. No. 165, 15 Colo. 593, 595; In re Loan of School Fund, 18 Colo. 195; and In re a Bill, etc., 21 Colo. 29.

thereupon,²³³ or limit their counsel to points suggested in an argument by *amici curiae*.²³⁴

9. *Questions of fact will not be investigated in advisory opinions.*

There is no foundation for the assertion of Story, J.,²³⁵ that in advisory opinions "questions of fact and of law may be decided without argument and without a jury." As a matter of fact, in Massachusetts, as in every other State where the constitution authorized advisory opinions (except Colorado), questions referred are specifically limited to questions of law. The justices have called attention to this more than once,²³⁶ and have refused plainly to pass upon questions of fact.²³⁷ Even in Colorado, where the constitution says "important questions," it was stated as early as 1889,²³⁸ that "for obvious reasons we hold that the intent could not have been to authorize questions of fact;" and this has been followed in later cases, at least one partial refusal being based upon it.²³⁹ Not infrequently, "as on a case stated" the justices have rendered opinions upon the questions of law involved in a set of facts as presented in the inquiry,²⁴⁰ but always it has been perfectly clear that a

²³³ Opin. of the Justices, 9 Cush. 604; In re Opin. of the Justices, 190 Mass. 611; Opin. of the Justices, etc., 25 N. H. 537; In the matter of the Constitutionality of HB. No. 270 and SBB. No. 69 and No. 106, etc., 9 Colo. 635; In re Kindergarten Schools, 18 Colo. 234; and In re HB. No. 203, 21 Colo. 27.

²³⁴ Opin. of the Justices, etc., 45 N. H. 593; In re Constitutionality of SB. No. 69, 15 Colo. 601; and In re Canal Certificates, 19 Colo. 63.

²³⁵ Deb. Mass. Conv. 1820, p. 489.

²³⁶ See Opin. of the Justices, 126 Mass. 557; and *Dinan v. Swig*, 223 Mass. 516.

²³⁷ Opin. of the Justices, 120 Mass. 600; and Opin.s of the Justices, etc., 18 Me. 458.

²³⁸ In the matter of the Constitutionality of SB. No. 65, 12 Colo. 466.

²³⁹ In re Appropriations by General Assembly, 13 Colo. 316.

²⁴⁰ Opin. of the Justices, 5 Metc. 596; Opin., 45 N. H. 607; Opin. of Justices, 70 N. H. 638; In re Opin. of the Justices, 76 N. H. 601; Opin. of the Justices, 33 Me. 587; In the matter of the Executive Communication, etc., 12 Fla. 686; In re Fire and Excise Commissioners, 19 Colo. 482; In re Casual Deficiency, 21 Colo. 403; and In re HB. No. 250, 26 Colo. 234.

party interested was quite free to prove a different state of facts in any later proceeding.²⁴¹ Even apart from the constitution, it would appear that this is a necessary limitation. The justices have not the facilities, in such consultations, for an examination of the facts; they lack the usual machinery of a court, especially the jury which is so important an element in the Anglo-American theory of judicial ascertainment of facts.

10. *Judicial notice may be taken of facts not stated in the interrogatory.*

This rule has been applied sometimes when extrinsic facts would throw light upon the cause for an inquiry and so tend to discover the particular points upon which advice was needed (see rule 8, *supra*). For instance in Opinion of the Justices, 9 Cushing, 604, the justices were guided by the recent report of the bank commissioners in concluding that the senate was chiefly interested in only one special corporation duty. Again, when the possibility of legislative action did not appear in the reference, the justices have taken judicial notice of the introduction of a bill upon the subject of the inquiry.²⁴² In Opinion of the Justices, 56 New Hampshire, 574, where the house of representatives asked if the governor had power to summon certain candidates in a contested election, the justices took judicial notice of the fact that two had already been summoned and sworn in as senators and so refused an opinion upon the completed act of the third department of government. In considering a proposed bill which applied to cities of over 100,000 population, a Colorado court took notice of the fact that Denver was the only city of the State that would probably come within the act for many years.²⁴³ An answer has been refused partly

²⁴¹ See especially *People v. Martin*, and *People v. Orr*, 19 Colo. 565: "The court may give its opinion upon the law based upon the facts submitted by the executive, but it cannot render judgment thereon, nor can it, upon such questions, undertake to determine questions of fact."

²⁴² In *re* Opin. of the Justices, 190 Mass. 611.

²⁴³ In *re* Constitutionality of SB. No. 293, 21 Colo. 38.

for the reason that the justices judicially knew that the session of the legislature would expire in three days, which did not allow enough time for a satisfactory hearing and argument.²⁴⁴ Other cases might be cited,²⁴⁵ but perhaps these will sufficiently indicate the operation of the rule.

11. *If an opinion is requested within a limited time the justices will endeavor to comply with the request, but an opinion may be refused if the time available will not permit a reasonable consideration of the question.*

The justices have frequently complained that advisory opinions were often requested under such circumstances that, if they were to be of any use to the interrogator, there was too little time for investigation, the hearing of arguments, or consultation among themselves.²⁴⁶ Sometimes they have stated that the opinion returned was only such as the time at their disposal permitted.²⁴⁷ The reference does not contain a definite

²⁴⁴ In re SB. No. 416, 45 Colo. 394.

²⁴⁵ For example see In re Relief Bills, 21 Colo. 62; and In re Casual Deficiency, 21 Colo. 403.

²⁴⁶ Questions presented for advisory opinions "are perhaps almost necessarily presented under circumstances indicating that an opinion is expected speedily. And they are received, when the mind, having been greatly exhausted by the pressing labors of other official duties, no longer possesses its natural vigor, and cannot exercise even its accustomed extent of thought or power of reason. And it cannot be allowed the time for that extensive research and patient examination and reflection, which the importance of the questions, often a little aside from the range of its accustomed studies and duties, may demand."—Opin. of the Justices, 16 Me. 479. Cf. the complaint of ex-Justice Morton in Deb. Mass. Conv. 1853, II, p. 694, and of the Colorado court in In the matter of the Constitutionality of SB. No. 65, 12 Colo. 466.

²⁴⁷ In re Opin. of Justices, 209 Mass. 607; Opin. of the Justices, etc., 45 N. H. 593; In re Opin. of the Justices, 73 N. H. 618; In re Opin. of the Justices, 76 N. H. 597; Opin. of the Justices, 2 Me. 439; In re the Constitutional Convention, 14 R. I. 649; In re State Warrants, 6 S. D. 518; In re House Roll 284, 31 Nebr. 505; Deb. Mass. Conv. 1853, I, p. 138 (N. Y. case); and Opin. of the Judges, etc., 37 Vt. 665.

time-limit²⁴⁸ or even a request for an early or speedy answer²⁴⁹ in many cases, but it is often apparent to the justices from the circumstances of the case (if they are "judicially known" to them) that an opinion should be rendered at an early date if at all.²⁵⁰ In such exigencies, a categorical answer has sometimes been returned promptly, and the reasons set forth at length in a subsequent communication.²⁵¹ In a very few instances an opinion has been refused partly, at least, because of insufficient time.²⁵²

It is evident that the time required for a fairly adequate consideration will vary with the nature of the questions referred. In some instances the Colorado justices have returned opinions upon legislative questions on the day following their submission. At other times they have taken as long as thirty days. The average for forty-nine references is eight and three-tenths days. In Massachusetts, the average for forty-five legislative references is fifteen and eight-tenths days, and for twenty-five executive references, eighteen and seven-tenths days. The lower average in Colorado may be due to the limitation of legislative sessions to ninety days, or to a less scrupulous consideration of questions referred. Until recently the opinions in Colorado were as a rule very brief and contained few reasons, while the Massachusetts justices have usually outlined the argument for their opinions as for regular cases. Because legislative inquiries

²⁴⁸ Opin. of the Justices, 126 Mass. 547; and Opin. of the Justices, etc., 25 N. H. 537.

²⁴⁹ Opin. of the Justices, etc., 41 N. H. 553; In re Opin. of the Justices, 66 N. H. 629; In re Opin. of the Justices, 76 N. H. 597; In re the Constitutional Convention, 14 R. I. 649; and In re Casual Deficiency, 21 Colo. 403.

²⁵⁰ Opin. of the Justices, etc., 45 N. H. 595; In re SB. No. 416, 45 Colo. 394; In re State Warrants, 6 S. D. 518; In re Quaere, etc., 31 Nebr. 262; and Deb. Mass. Conv. 1853, I, p. 138 (N. Y. case).

²⁵¹ Opin. of the Justices, etc., 45 N. H. 595; In re Opin. of the Justices, 66 N. H. 629; and In re Quaere, etc., 31 Nebr. 262.

²⁵² Opin. of the Court, 58 N. H. 623; In the matter of Senate Resolution on the subject of Irrigation, 9 Colo. 620; In re Bill, etc., 23 Colo. 504; In re HB. No. 99, etc., 26 Colo. 140; and In re SB. No. 416, 45 Colo. 394.

generally relate to pending bills, it is to be expected that the justices would tend to hurry their answers a little more than for executive inquiries, and this seems to be true in Massachusetts at least.

12. *In rendering advisory opinions, the justices should act individually and not as a court.*

There can be no question that this is true in every State except possibly Colorado. It has been expressly stated by the justices themselves in Massachusetts,²⁵³ New Hampshire,²⁵⁴ and Missouri,²⁵⁵ that "in giving such opinions, the justices do not act as a court, but as the constitutional advisers of the other departments of the government." This assertion was not based upon the words of the constitution, but upon the evident nature and purpose of the device. In the Massachusetts opinion, it follows a very painstaking historical review of the advisory opinion in England. Additional support for the rule may be found in the scores of instances where individual opinions have been given, both in concurrence and dissent.²⁵⁶

Only in Colorado has there been an attempt to set up the contrary rule. As usual, the source of disagreement is in the matter of the Constitutionality of SB. No. 65, 12 Colorado, 466. In that case, Helm, C. J., emphasized the fact that the constitution imposed the advisory duty upon the court and not the justices, and made this an argument for the binding force of advisory opinions in Colorado (see next rule). It is submitted that the learned chief justice gave too great weight to the exact words of the constitution and too little regard to the history and intent of advisory opinions.²⁵⁷ A member of the judiciary committee that proposed the amendment of 1886 in the senate²⁵⁸

²⁵³ Opin. of the Justices, 126 Mass. 557.

²⁵⁴ Opin. of the Court, 60 N. H. 585.

²⁵⁵ Opin. of Supreme Court Judges, etc., 55 Mo. 295.

²⁵⁶ See pp. 149-151 *supra*.

²⁵⁷ See Thayer in *The Nation*, Vol. 49, p. 476.

²⁵⁸ O. F. A. Greene in *The Nation*, Vol. 50, p. 50.

tells us that the provision as worded was "injected into the bill by a hasty amendment in committee of the whole," that the legislative mind had no such intent as was attributed to it by the chief justice, and that "in legislative parlance, when any power is to be conferred upon the court as a whole, or upon any of its members as judges, it is customary to use the term 'the Supreme Court.' " As a matter of course, the assignment of duties to the justices of the supreme court as individuals is very rare, and it is quite natural that the legislative habit of referring to them collectively as the "supreme court" should have influenced the wording of a hastily framed clause. Again, if the application of the device were to be guided strictly by the words of the constitution, it is not perceived why emphasis should not be placed upon the word "opinion" as contradistinguished to "decision," or why questions of fact as well as questions of law should not be within the scope of the clause.

Although advisory opinions in Colorado have, as a rule, been given "Per Curiam,"²⁵⁹ this doctrine of 1889 has been reasserted only once,²⁶⁰ and that by a chief justice who had been one of the justices in the earlier case. In fact, individual replies have been made in Colorado,²⁶¹ though it still seems to be accepted that an opinion upon the question referred should not be given unless the majority think the reference is within the clause.²⁶² Except in such cases, the question is of little importance, unless the giving of opinions by the court be used as an argument for their force as judicial precedents, and we hope to show that this latter theory is of doubtful validity, even in Colorado.

²⁵⁹ See pp. 147-148 *supra*.

²⁶⁰ In re Priority of Legislative Appropriations, 19 Colo. 58.

²⁶¹ In re SB. Providing for a Board of Public Works, etc., 12 Colo. 188; In re HR. No. 10, 50 Colo. 71; and In re Interrogatories of the Senate, 54 Colo. 166.

²⁶² In re Interrogatories of the Senate, 54 Colo. 166.

13. *Advisory opinions have no binding force as precedents, except possibly in determining later extra-judicial practice.*

Viewed in the light of historical origin and development, the advisory opinion, as we now call it, must unquestionably be understood as subject to the limitation expressed in this rule. It is the modern form of the advice given to the English king and House of Lords by the king's councillors. The words used to describe the practice are sufficiently indicative of its juridical character. The judges are called on to counsel and advise;²⁶³ opinions, not judgments, are required.²⁶⁴ These opinions had no compelling force with the king or lords, and before the end of the eighteenth century, the judges had made it clear that they would not be bound by them in later cases, but reserved the right to change their opinion "in case they should see cause for it."²⁶⁵

The early practice in the United States fully accorded with this view, and in some States there has been no tergiversation at all. In Massachusetts the rule was first announced in *Adams v. Bucklin*,²⁶⁶ a regular case in which the court referred to an earlier opinion,²⁶⁷ saying: "We do not however consider that opinion binding upon us in this action; but after carefully revising it, we are satisfied of its correctness, and with the reasons given in support of it." In 1844, they gave a real *ex parte* opinion reluctantly, with the understanding that such an opinion could not be considered "as having the force of a judgment, binding on the rights of parties" but "must be taken as an opinion upon the precise question pro-

²⁶³ *Northumberland's Case*, Rot. Parl. 5 Henry IV, Nos. 11 and 12; *Duke of York's Case*, Rot. Parl. 39 Henry VI, No. 12; and 3-4 Wm. IV, c. 41, s. 4.

²⁶⁴ *Commission Case*, Fortescue 392; *Peacham's Case*, Bacon's Works, IV, pp. 593, 596, 601; *Paty's Case*, 14 East, 92 n.; *Whiston's Case*, Burnet's Own Times, p. 867.

²⁶⁵ See pp. 14-16, 23, *supra*.

²⁶⁶ 7 Pick. 125.

²⁶⁷ *Opin. of the Justices*, 7 Pick. 130 n.

posed, which cannot affect the rights of parties, should they hereafter be brought before the court in a regular course of judicial proceeding."²⁶⁸ An opinion was cited by the attorney-general as an authority, in *Green v. Commonwealth*,²⁶⁹ but the court observed that "an opinion formed and expressed under such circumstances cannot be considered in any sense as conclusive or binding on the rights of parties, but is regarded as being open to reconsideration and revision." The same rule has been reiterated again and again by the Massachusetts justices,²⁷⁰ and has never been questioned in that State. This is true also of New Hampshire,²⁷¹ Rhode Island,²⁷² Florida,²⁷³ and of a number of States where advisory opinions are extra-constitutional.²⁷⁴ On principle, the rule should apply also to opinions required under a statute, and this view has been taken in Oklahoma²⁷⁵ and in Canada.²⁷⁶ It will be remembered that in some of the provinces since 1890 and in the Dominion since

²⁶⁸ Opin. of the Justices, 5 Metc. 596.

²⁶⁹ 12 Allen, 155.

²⁷⁰ Opin. of the Justices, 122 Mass. 600; Functions of Judiciary, 148 Mass. 623; In re Opin. of the Justices, 190 Mass. 611; In re Opin. of the Justices, 214 Mass. 599; In re Opin. of the Justices, 214 Mass. 602; *Young v. Duncan*, 218 Mass. 346; and *Woods v. Woburn*, 220 Mass. 416.

²⁷¹ Opin. of the Justices, etc., 25 N. H. 537; Opin. of Justices, 70 N. H. 638; and In re Opin. of the Justices, 76 N. H. 597.

²⁷² *Taylor v. Place*, 4 R. I. 324.

²⁷³ In the matter of the Executive Communication, etc., 12 Fla. 686; In the matter of the Executive Communication, etc., 14 Fla. 289; and In re Opin.s of the Justices, 69 Fla. 632.

²⁷⁴ Reply of the Judges, etc., 33 Conn. 586; In re Railroad Commissioners, 15 Nebr. 679; and Report of the Judges, etc., 3 Binney, 595.

²⁷⁵ *State v. Johnson*, 21 Okla. 40; Opin. of the Judges, 3 Okla. Cr. 315; In re Opin. of the Judges, 6 Okla. Cr. 18; and In re Opin. of Judges, 6 Okla. Cr. 210.

²⁷⁶ In re Certain Statutes, etc., 22 Can. S. C. R. 577; Attorney-General for Ontario v. Attorney-General for Dominion, et al., (1896) A. C. 348; In the matter of Jurisdiction over Provincial Fisheries, 26 Can. S. C. R. 444; and In the matter of the Representation of Prince Edward Island, etc., 33 Can. S. C. R. 594.

1891, the advisory character of the opinions is clearly indicated in the statutes; so the later protestations of the judges were unnecessary.²⁷⁷ The case is a little more difficult when the statute attempts to give the opinions more than advisory force. It seems to be true in Canada that even if the statute says an opinion "shall be deemed a judgment of the Court," the judges may limit that effect to special purposes and hold that the opinion is for information alone.²⁷⁸ Certainly the supreme court of Canada will not entertain an appeal from such a "judgment."²⁷⁹ On the other hand, when the purpose of the statute is to secure a judicial declaration as to the constitutional passage of an act under suspicion, perhaps the judges will act upon a direction to nullify such law.²⁸⁰

It remains to consider the anomalous doctrine of a few cases in Maine and Colorado. The early Maine practice seems to have been sound. In *State v. Cleveland*, 58 Maine, 564, Kent, J., says: "It is true, unquestionably, that the opinions given under a requisition like this have no judicial force, and cannot bind or control the action of any officer of any department. They have never been regarded as binding upon the body asking for them." He finally persuades himself to give an opinion only because it "cannot have any authoritative force in any possible future proceedings in the case." Tapley, J., takes the same position in *Opinion of the Justices*, 58 Maine, 590. The opposite theory is a product of the awkward political predicament of 1879. Governor Garcelon asked advice as to a series of election details,²⁸¹ but apparently finished canvassing the votes before the answer reached him.²⁸² The names of

²⁷⁷ *In re Criminal Code*, 43 Can. S. C. R. 434; *In re References, etc.*, 43 Can. S. C. R. 536; and cf. *Attorney-General for Ontario v. Attorney-General for Canada*, (1912) A. C. 571.

²⁷⁸ *In re Ontario Medical Act*, 13 Ont. L. R. 501.

²⁷⁹ *Union Colliery Co., etc., v. Attorney-General of British Columbia, et al.*, 27 Can. S. C. R. 637.

²⁸⁰ *In re an Act, etc.*, 83 N. J. L. 303.

²⁸¹ *Questions Submitted, etc.*, 70 Me. 560.

²⁸² See *Statement and Questions Submitted, etc.*, 70 Me. 600.

many candidates for the legislature were rejected because of alleged defects in the returns (not recognized as defects in the opinion of the justices). Rival legislatures were organized, one of which (composed partly of the rejected candidates) asked the justices whether the governor and council had a right to summon, as elected, persons "who by the official returns under the decision of the court (do) not appear to be elected."²⁸³ This phraseology was of course dictated by a misapprehension of the character of the opinion previously rendered, for the court had given no decision and could not have done so in the premises. But the justices were seduced by the fallacy. "The opinion of the court was thus obtained," they said, "in one of the modes provided in the constitution for an authoritative determination of 'important questions of law.' The law thus determined is the conclusive guide of the governor and council in the performance of their ministerial duties. Any action on their part in determining the vote as it appears by the returns in violation of the provisions of the constitution and law thus declared is an usurpation of authority, and must be held void." The radical doctrine thus enunciated was supported by no argument and no citation of authorities. It was the fiat of the justices. It proceeds upon false hypotheses and leads to incorrect results. The opinion given to the governor was not the opinion of the "court" but of the justices. The word "authoritative" as used is a specious *petitio principii*. Clearly the assumption of their power to control the governor and council in the exercise of duties entrusted exclusively to them by the constitution was the real usurpation. In other respects the opinion bears evidence of being carelessly drafted. It could not have been very carefully considered for a list of twenty-five somewhat complicated questions was answered in four days. Also quite likely the attitude of the justices was influenced by the popular excitement that prevailed.²⁸⁴

²⁸³ Statement and Questions Submitted, etc., 70 Me. 570.

²⁸⁴ It would be interesting to know whether the political complexion of the court was the same as that of the rejected candidates.

Thayer, writing in 1885,²⁸⁵ says: "It may be confidently expected that the subject, in Maine, will not rest where it is thus left." This prophecy has, we think, been completely realized. Even in 1881, two of the justices who had participated in the objectionable opinion admit that an opinion given to the council as to the governor's right to remove the supreme court reporter would bind neither the State nor the reporter, and would have no effect upon the court, "if the matter should be judicially brought before" it in a later case.²⁸⁶ By 1901, all the justices are agreed that an advisory opinion "has not the binding force of a judgment of court" and is not "within the principle of *stare decisis*."²⁸⁷ Finally the matter was brought definitely before the court in two regular cases. A Maine opinion was cited in *Sawyer v. Gilmore* (1912),²⁸⁸ and the court not only pointed out that "the opinions of Justices given at the request of either Branch of the Legislature or of the Executive do not have the binding force of decisions in adjudicated cases," but actually modified the rule of the opinion cited. "We do not feel," they say, "that the conclusions reached in this decision after mature deliberation should be modified because of these expressions in the opinions of the Justices which are in the nature of dicta in an unadjudicated case" (at page 185). And again, in *Laughlin v. City of Portland* (1914),²⁸⁹ the plaintiffs confidently relied upon two advisory opinions from Massachusetts, and the court replied that they did not "have the force of a decision." We may fairly conclude that the sporadic doctrine announced by the Maine justices in 1880 has been discredited in that State and that the present day practice is in harmony with the rule as stated above.

²⁸⁵ Leg. Essays, p. 56.

²⁸⁶ Libbey and Walton, JJ., in Question Submitted, etc., 72 Me. 542.

²⁸⁷ Opin.s of the Justices, 95 Me. 564; cf. opinion of Savage, J., in *In re Opin. of the Justices*, 103 Me. 506.

²⁸⁸ 109 Me. 169.

²⁸⁹ 111 Me. 486.

The erroneous belief in the conclusiveness of extra-judicial opinions has been more persistent in Colorado, though it has rested entirely upon *obiter dicta*. It saw the light first in the compendious exposition of 1889 to which we have so often referred.²⁹⁰ Starting with the questionable proposition (see rule 12 *supra*) that opinions are to be given by the court and not the justices, and observing also that responses are to be reported "as are other opinions," Helm, C. J., abruptly comes to the conclusion that "they have all the force and effect of judicial precedents." We have already presented our objections to the premise stated. His second observation is misleading. The giving of advisory opinions in writing is characteristic of the American practice throughout, and is desirable as a matter of convenience.²⁹¹ Then the constitution does not say advisory opinions are to be reported "as are other opinions;" it says they "shall be published in connection with the reported decisions of said court." A distinction seems to be made between "opinions" and "decisions." If the intention was to place both on the same plane, as the chief justice infers, why did not the legislature say "in connection with the other decisions of said court?" Again we have the evidence of Mr. O.F.A. Greene, whose relation to the amendment entitles him to a careful hearing, that the legislature had no such intention,²⁹² and that the reporting of opinions was "solely for convenience of reference."²⁹³

²⁹⁰ In the matter of the Constitutionality of SB. No. 65, 12 Colo. 466.

²⁹¹ See pp. 42-44, 146-147 *supra*.

²⁹² "The position of Judge Helm in drawing inferences in his opinion upon historic grounds and slight verbal changes against *stare decisis* is untenable. The judge by his construction gives to the provision . . . a meaning that the Legislature framing it did not contemplate—that is to say, the legislative mind had neither a negative nor an affirmative purpose in regard to the value of such opinions as general judicial precedents. . . . The very hostility of the Legislature to the court at that time precluded any intention of enlarging such power beyond the necessity of the expedient." Letter in *The Nation*, Vol. 50, p. 50.

²⁹³ *Ibid.*

But the court could not face the logical consequences of its own pronouncement. It fell to the lot of a member of the 1889 court, when he became chief justice, to reject the rule of his predecessor in unmistakable terms. In 1893, he toned it down slightly²⁹⁴ and the following year was compelled to abandon it altogether. An opinion had been given to the governor assuring him that, on the facts stated in his interrogatory, he had rightly removed the fire and excise commissioners of Denver, but advising him that he should not use force to effect their removal, but resort to judicial proceedings.²⁹⁵ Then when *quo warranto* was brought, the court stated plainly that the opinion given to the governor was not binding upon them and might require modification upon argument in a litigated case.²⁹⁶ The same court reasserted these principles in *People v. McClees*,²⁹⁷ and a slightly different court in *People ex rel. v. Le Fevre* gave particular attention

²⁹⁴ "By our constitution questions are to be propounded to, and answers returned by, the court, instead of the justices, as elsewhere, and published in connection with other decisions, thus giving such answers to some extent the force and effect of judicial precedents."—per Hayt, C. J., in *In re Priority of Legislative Appropriations*, 19 Colo. 58.

²⁹⁵ *In re Fire and Excise Commissioners*, 19 Colo. 482.

²⁹⁶ "But it could not be assumed that such *ex parte* statement could not be controverted, nor that an opinion based thereon might not require modification when the other side should present their cause in court as they had a right to do. It would have been highly improper to give an unqualified opinion upon such *ex parte* statement. No opinion based upon such statement could have been made to bind the parties contending for official place upon the fire and police board. While the constitution requires this court to 'give its *opinion* upon important questions upon solemn occasions when required by the governor,' it does not require, nor does the constitution permit, this court to render *judgment* in connection with such opinion. The court may give its opinion upon the law based upon the facts submitted by the executive, but it cannot render judgment thereon, nor can it, upon such questions, undertake to determine questions of fact."—*People v. Martin* and *People v. Orr*, 19 Colo. 565.

²⁹⁷ "In no doubtful case where large interests are involved will an *ex parte* opinion be accepted as decisive. This is well illustrated in respect

to the arguments in a case that would have been governed by an earlier advisory opinion if binding, in order that a precedent might be "established in a case where unquestionably both sides appear."²⁹⁸ In this latter instance, great weight was given to the earlier opinion because it had been "the unquestioned law of this State for more than seven years," but even so the relators were not "estopped to question the soundness of this decision (?), if it is wrong." This careless use of the word "decision" may be found in even later cases.²⁹⁹ There is a worse backsliding in 1900. On a prosecution under the eight hour law of 1899, the court called attention to its unfavorable opinions upon the law when pending and said: "But wholly disregarding these decisions, binding alike on all departments of government, it proceeded to enact the measure now before us."³⁰⁰ Still the case is not an authority for the binding effect of opinions on anybody, for the court proceeds to test the act all over again before making a decision.³⁰¹ Fi-

to the very matters now sought to be brought before this court for reconsideration. See *In re Election of District Judges*, 11 Colo. 373, where these same matters were considered and an opinion given in response to a question from the governor. That opinion, however, was given before the calling of the election, so that no individual claims to office had arisen. It is manifest that such opinion is not now accepted as conclusive, because not delivered in an actually litigated case. We refer to this as fortifying the view that the present controversy must be heard and determined, if at all, in some proceeding where the jurisdiction of the court is undoubted. When it is heard and determined in a proceeding where the court has jurisdiction, not only to express its *opinion*, but to render and enforce its *judgment*, the decision will have more weight."—*People v. McClees*, 20 Colo. 403.

²⁹⁸ 21 Colo. 218.

²⁹⁹ E. g., *Parks v. Soldiers' and Sailors' Home*, 22 Colo. 86; and *In re Application of Morgan, etc.*, 26 Colo. 415.

³⁰⁰ *In re Application of Morgan, etc.*, 26 Colo. 415.

³⁰¹ "Following the rule of *stare decisis*, we might content ourselves with a mere affirmance of our previous announcements, made, as they were, upon full consideration; but in view of the importance of the questions involved we have thought it best fully to discuss the principles by which this act must be tested."—*ibid.*

nally in a 1913 case ³⁰² it was correctly stated by Scott, J., (albeit *obiter*) that the answer requested was only advisory and "may be reviewed or changed upon a more formal and complete investigation."

Collating the above opinions, it must be admitted that it is difficult to determine the prevailing rule in Colorado. The statements quoted are, it is conceived, irreconcilable. However, it is submitted that the weight of authority excludes the application of *stare decisis* to advisory opinions. It will be seen presently that there are quite a few cases where doctrines announced in advisory opinions have been followed; but this is quite consistent with the respect paid to advisory opinions in other States,³⁰³ where it has never been suggested that advisory opinions had binding force. More important for our purpose are those few cases in which the judges have unequivocally stated that they were not bound by opinions previously given, but would reopen the question and review their conclusions in a regular case at any time. There is no clear case to the contrary. But do the answers bind the interrogators? Here we are at an impasse. The legislature has disregarded the opinions of the justices; the justices have asserted their opinions are binding upon the legislature. This phase of the question is not of great practical importance, for the legislature and governor evidently can do what they will—judicial protest is a *brutum fulmen*.

In passing a reference might be made to the practice in the two States not mentioned above. The only indication we have of the attitude of the Missouri justices is in a case of 1868,³⁰⁴ where they accompany a refusal to give an *ex parte* opinion, with the observation that "the expression of opinions on such matters might be looked upon as prejudging the case, and would greatly embarrass the court in its subsequent ad-

³⁰² In re Interrogatories of the Senate, 54 Colo. 166.

³⁰³ See pp. 201-202 *infra*.

³⁰⁴ In the matter of the N. Mo. R. R., 51 Mo. 586.

judications." As they answered similar questions in other cases, without worrying about the judicial effect of such answers, their *dictum* need not be taken very seriously. In South Dakota, the principle stated by Helm, C. J., in the Colorado opinion of 1889 found letter-perfect adherence in the justices of 1897,³⁰⁵ but a later court met the attorney-general's suggestion that their opinion would settle a certain question with an unmistakable disclaimer. "The answer would not amount to a decision of the Supreme Court of this State, but would merely be an advisory opinion of the judges not conclusive upon the rights of parties, and binding on no one. . . It is clear to us that the duty of the federal courts to follow the decision of a state court in matters pertaining to the construction of a state Constitution does not comprehend advisory opinions of judges which do not have the force of judicial decisions. . . . The distinction between the binding effect of a decision of the Supreme Court of South Dakota and an advisory opinion of the judges is obvious."³⁰⁶

We think it has been shown that the precedents justify the rule as formulated above. Advisory opinions have not the force of judicial precedents, and the doctrine of *stare decisis* has no application to them if the same question is presented to the court in a case *inter partes*. When the prevailing practice is essentially agreed upon the rule, the burden of proof is upon those who allege an exception. The matter has been in doubt in only three States. In Maine and South Dakota the dissention was a "hapax legomenon" which now stands corrected. In Colorado, the case is not so clear for the rule, but most of the opposition consists of *dicta* found in opinions, while the weight of regular decisions is in its favor. Every writer in the field of law who has dealt with the question has concluded that this is sound jurisprudence. In 1885 Thayer gave it considerable attention in a "Memorandum on the

³⁰⁵ In re HR. No. 30, 10 S. D. 249.

³⁰⁶ In re Opin. of the Judges, 34 S. D. 650.

Legal Effect of Opinions given by Judges," etc., and said "it seems clear that the opinions herein referred to are purely advisory."³⁰⁷ The accepted practice of the last thirty years has been corroborative of that statement.

This is as it should be on principle. The opinions are for the guidance of the other departments in difficult paths. They are advice or counsel, to aid in the solution of legislative and executive problems. Necessarily these problems sometimes involve questions of private right, but that does not mean that the advisory opinion scheme must be interpreted as a new and extraordinary way by which private rights may be adjudicated. The reasons usually given for the doctrine of *stare decisis* apply in very small degree to the advisory opinion, if its character once be clearly understood. The matter dealt with in an advisory opinion certainly is not *res judicata*. Facts are not investigated; all the parties concerned are probably not represented before the court—they do not come before the court asking for anything, and the opinion of the court is not given to them but to a coordinate branch of the government. Would the justices who have called these opinions "decisions" or "adjudications" grant execution if the party favored by an opinion should ask for it? Surely not; yet this is the logical consequence of a decision. But, it is said, it is admitted that an advisory opinion is not a real decision, but it is "in the nature of a decision," it has the force and effect of a "judicial precedent." If, by this first phrase, it is meant that advisory opinions are delivered by judicial officers in a form similar to the decision rendered in a case, plainly it is not a reason why they should be binding. Possibly the first phrase is merely synonymous with the second. Now what is the argument for the compelling force of precedents? There is no need of giving space

³⁰⁷ Thayer, *Legal Essays*, pp. 42-60; cf. also his essay on Constitutional Law, *ibid.*, p. 34 (1893), and on "International Usages," *ibid.*, p. 185 (1895); see, too, Dubuque in *Am. L. Rev.* XXIV, p. 369, at p. 374; also *Harv. L. Rev.* X, pp. 50-51, and *Albany Law Journal* LIX, p. 21.

to a detailed review of it here. It is well known that it presupposes a decision by a court of competent jurisdiction in a case regularly presented and argued in the course of judicial proceedings. Because the parties to a particular action have been compelled to adjust their business relations according to certain rules by a court which has advisedly considered the law applicable to those relations, other persons are justified in assuming that in all probability the same rules would be imposed upon them in similar circumstances. Would they be justified in assuming, too, that rules announced to the legislative or executive departments of government by way of assistance would be imposed upon individual litigants in a judgment? This has been answered in the affirmative on the ground that private individuals may reasonably assume that the judicial mind will, under the same conditions, arrive at the same results. Here is the crux of the matter. The conclusion would be defensible, if the hypothesis were satisfied. But the conditions are not the same. In formulating advisory opinions, the judges are commonly unassisted by the argument of counsel, they are required to deal with an abstract question of law upon a given statement of facts, and they are often very limited as to time. Opinions given under such circumstances are not always carefully considered and should be accepted with caution. This would be true of judgments as well. Some judges have made it a rule not to be bound by their own decisions upon points not argued before them, and have changed their opinion upon argument.³⁰⁸

It comes to this, then, that advisory opinions are entitled to the reverence which their intrinsic qualities merit. This has been accorded them in every State where they exist, and

³⁰⁸ Story, J., in *Deb. Mass. Conv.* 1820, p. 490. Cf. "It might almost be suggested as a wise rule to apply to the use of judicial decisions as precedents, that no case should be held to acquire binding force as law unless the point on which it was decided had been argued by counsel."—Bouvier, *s. v.* Precedents.

in others as well. Their influence upon the public law of some States has been considerable.³⁰⁹ Where the question referred has evidently been scrupulously and deliberately pondered, and especially if legal assistance has also been enjoyed, or where the reasoning is unimpeachable, an opinion may have practically as much weight as if it had been delivered as a regular decision.³¹⁰ This is particularly true if it has stood unquestioned for a good many years. So we find that the rules of different opinions are cited with approval in a good many litigated cases.³¹¹ In many instances these rules have actually been "followed" in regular cases, though usually only after the court had revised them and were satisfied of their correctness.³¹² Sometimes an opinion may even be cited as the authority for a rule of law, i.e., as a leading case, when it has been "followed" for a number of years,³¹³ or when it states the rule concisely and

³⁰⁹ An evidence of this influence is seen in the fact that Thayer includes eight advisory opinions in his *Cases on Constitutional Law*, and Cooley cites thirty in his *Constitutional Limitations* (6th ed.).

³¹⁰ See *In re Opin. of the Justices*, 214 Mass. 602.

³¹¹ *Nichols v. Election Commissioners*, 196 Mass. 410; *Dinan v. Swig*, 223 Mass. 516; *Bingham v. Jewett*, 66 N. H. 382; *Wyatt v. State Board of Equalization*, 74 N. H. 552; *Thompson v. Pittston*, 59 Me. 545; *Allen v. Jay*, 60 Me. 124; *Donnell v. Joy*, 85 Me. 119; *Bangor v. Frankfort*, 85 Me. 128; *The People v. Richmond et al.*, 16 Colo. 274; *Henderson v. People ex rel. Wingate*, 17 Colo. 587; *Mayor, etc., v. Shattuck*, 19 Colo. 104; and *People ex rel. v. Sours*, 31 Colo. 369.

³¹² *Adams v. Bucklin*, 7 Pick. 125; *Farwell v. Boston*, 192 Mass. 15; *Young v. Duncan*, 218 Mass. 346; *Woods v. Woburn*, 220 Mass. 416; *Sawyer v. Gilmore*, 109 Me. 169; *Laughlin v. City of Portland*, 111 Me. 486; *People v. Martin and People v. Orr*, 19 Colo. 565; *City of Denver v. Coulehan*, 20 Colo. 471; *People ex rel. v. District Court of Arapahoe Co.*, 23 Colo. 150; *In re Application of Morgan, etc.*, 26 Colo. 415; and *Denver v. Londoner*, 33 Colo. 104.

³¹³ *Attorney-General v. Haverhill Gas Light Company*, 215 Mass. 394; *Dow v. Railroad*, 67 N. H. 1; *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 336; *Murchie v. Clifford*, 76 N. H. 99; *French v. Lyme*, 77 N. H. 63; *People v. State Board of Equalization*, 20 Colo. 220; *People ex rel. v. Le Fevre*, 21 Colo. 218; *Parks v. Soldiers' and Sailors' Home*, 22 Colo. 86; *Stuart v. Nance*, 28 Colo. 194; and *City of Denver v. Iliff*, 38 Colo. 357.

conveniently.³¹⁴ There can be no objection to judges thus taking advantage of the wisdom and good reasoning of their predecessors as exhibited in advisory opinions just as they do when they are embodied in the *dicta* of regular cases. But the adoption of advisory rules should be critical and not slavish, voluntary and not compulsory. This warning applies especially to the lower courts of a State. The supreme court justices have sometimes expressed an apprehension lest their advisory opinions be in a sense a prejudgment of rights, because lower courts would usually be controlled in their decisions by the principles expounded in the opinions.³¹⁵ Often this would doubtless be true,³¹⁶ just as subordinate judges give much weight to the *dicta* of superior courts as foreshadowing the conclusions they would reach if the questions discussed *obiter* had to be decided. There can be no great harm in this. Judges of the caliber to perceive the fallacies of *dicta* and opinions will usually realize well enough that they are not bound thereby.

Coming to the exception appended to rule 13, we find a much simpler problem. The legal fondness for regularity and definiteness in procedure and interpretation has played a most important part in developing the advisory opinion. Many examples have been given, in this and previous chapters, of long series of opinions in a given State in which the same rule of interpretation or the same *modus operandi* was consistently followed. In many respects the practice of all the States is now approaching uniformity. If it were not for this consistency and uniformity, even an imperfect exposition of the advisory opinion could not have been written. It might almost be said that there is a real *stare opinionibus* theory in the United

³¹⁴ *Watson v. Needham*, 161 Mass. 404; and *Citizens Gas Light Co. v. Wakefield*, 161 Mass. 432.

³¹⁵ *Functions of Judiciary*, 148 Mass. 623; and *In re Opin. of the Justices*, 190 Mass. 611.

³¹⁶ *C. F. & I. Co. v. State Board of Land Commissioners*, 14 Colo. App. 84, for example.

States, at least as far as concerns the interpretation of the clause and the technic of the practice. In one hundred and fifteen of the four hundred and ten constitutional opinions rendered in the United States, there are citations to previous opinions in the same State, and references to opinions given in other States are almost as common. "It is the settled practice of this court," "It has been repeatedly pointed out that our opinions," "Testing the questions propounded by the rules established," and many other phrases of a similar nature, supported by numerous cases, are frequently encountered in advisory opinions. Specific examples are scarcely necessary. The judges have shown as great a reluctance to vary the advisory practice as they do in litigated cases. An exception to an established rule is admitted only in extraordinary exigencies and a return to the "better practice" is made at the first opportunity. As a result, we have the existing, fairly well-organized, body of advisory opinion law.

CHAPTER IV

OTHER FORMS OF JUDICIAL INFLUENCE

Before examining the effect of the advisory opinion scheme upon the position of the judiciary in a modern state, we may profitably notice some other devices which call upon the judges for extra-judicial activity. If a separation of powers were completely carried out, such activity would be prohibited. Yet the devices we are about to mention are all found in States of the Union or in Central or South American states which modeled their constitutions upon ours. The purpose, in every instance, would appear to be the same as that of the advisory opinion scheme—to secure expert legal assistance of a semi-official sort to legislators and executives who lack legal training and experience. The effect, in almost every case, if the device were used very much, would be much more radical than is true of the advisory opinion; the judiciary would at least exercise very great influence with the other departments and might even actually perform executive and legislative duties in their proper persons.

The older expedients look to the co-operation of the executive and judicial departments, quite probably with the design of restraining a too-aggressive popular legislature. Thus in 1777, the New York constitution provided that the governor, chancellor and judges of the supreme court should constitute a council to revise all bills before or after passage by the general assembly, and a majority of this council could force repassage by two-thirds of both houses.¹ As the judiciary had a majority representation, this practically placed in their hands a suspensive

¹ "And whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed: Be it

veto quite similar to that now enjoyed by the president of the United States, and besides gave them the privilege of criticising pending bills. The revisory council did not survive a renovation of the constitution in 1821. There was very little opposition to dropping it. Not much of a case is made out against it in the convention debates, yet its downfall was certain from the start, due rather to prejudice or an objection on principle than to actual grievances. Some of the arguments urged against it are essentially identical with arguments made against the advisory opinion.² A few claimed that the judges were the real legislature, under this system, and could defeat the will of the people. Mr. Platt of Oneida looked up the record of the council and found that of the sixty-five hundred and ninety bills passed by the legislature from 1777 to 1815, the council had vetoed one hundred twenty, or less than two percent, and only forty-three of these on grounds of expediency. Seventeen had

ordained, that the governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature. . . . And that all bills which have passed the senate and assembly shall, before they become laws, be presented to the said council for their revisal and consideration; and if, upon such revision and consideration, it should appear improper to the said council, or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the senate or house of assembly (in whichever the same shall have originated) who shall enter the objections sent down by the council at large in their minutes and proceed to reconsider said bill. But if, after such reconsideration, two-thirds of said senate or house of assembly shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law."—From section 3 of the N. Y. Const. of 1777.

² Cf. a later criticism by Baldwin—*Amer. Judiciary*, p. 31: "An obvious objection to this method of legislation is that the judges who, as members of a council of revision, find nothing objectionable in a bill presented for their scrutiny, must naturally have a certain pride of opinion to conquer before, should its constitutionality become afterward the subject of litigation

passed over the council's veto. But the justification was futile and, as Mr. Root said, merely a "requiem."³

It will be recalled that a serious effort was made by Madison, Gouverneur Morris and others to include this revisory council plan in the federal constitution,⁴ and that the failure of the movement was possibly due to a feeling that the legislature would be sufficiently checked by a presidential veto coupled with a judicial power to declare acts null and void. The scheme met with a better reception in Illinois, where it was received into the constitution of 1818 (Art. III, sec. 19) in almost the exact words of the New York model. But here again it lasted only until a new constitution was framed, for it does not appear in the constitution of 1848. It is believed that the council of revision has not found a place in any of our State constitutions since that time. In a letter of 1790, President Washington intimated that the judiciary system might be perfected more readily if the results of judicial experience were communi-

before them, they could be in a frame of mind to render an unprejudiced judgment. One of the bills which came under the eye of Chancellor Kent as a member of the Council was afterward the source of controversy before him in court. He adhered to his original views, but was over-ruled by the Supreme Court of the United States." This is the inherent positivity of human nature and might be illustrated as well by the characteristic tenacity of opinion exhibited by judges when dealing with a case already decided by them in a lower court. But judges have also been known to change their minds upon reconsideration, both when their first opinion was extra-judicial and when it was a formal decision. So the criticism has not much cogency after all. As to the particular instance given, it might be pointed out that the opinion of Chancellor Kent was approved by all the judges of the New York Court of Errors (*Gibbons v. Ogden*—17 Johns. 488) before the case was taken to the supreme court of the United States; also that Chancellor Kent and the Court of Errors paid no attention to the approval of the Council of Revision, but relied on an earlier case (*Livingston v. Van Ingen*, 9 Johns. 507).

³ Deb. N. Y. Conv. 1821, p. 47.

⁴ See pp. 55-57 *supra*.

cated to him, but there is no record that the judges ever availed themselves of this invitation.⁵

Co-operation between the legislature and the judiciary has been encouraged in various ways. The Illinois convention of 1870 recognized that the judges, both of the supreme court and of lower courts, were especially well qualified to know the imperfections and lacunae in the laws as they existed, both because of their legal training and experience and because of their daily application of the laws to particular sets of facts. They provided that the judges of all courts of record should report annually to the judges of the supreme court and that the latter should report to the legislature upon defects or omissions in the laws and should suggest appropriate corrective legislation.⁶ The Nebraska convention of 1875 copied this provision in part,⁷ and the Colorado constitution of 1876 re-

⁵ "I have always been persuaded, that the stability and success of the national government, and consequently the happiness of the people of the United States, would depend in a considerable degree, on the interpretation and execution of its laws. In my opinion, therefore, it is important, that the judiciary system should not only be independent in its operations, but as perfect as possible in its formation. As you are about to commence your first circuit, and many things may occur in such an unexplored field, which it would be useful should be known, I think it proper to acquaint you, that it will be agreeable to me to receive such information and remarks on this subject, as you shall from time to time judge expedient to communicate."—Spark's Washington, X, p. 86.

⁶ "All judges of courts of record, inferior to the supreme court, shall, on or before the first day of June of each year, report in writing to the judges of the supreme court such defects and omissions in the laws as their experience may suggest; and the judges of the supreme court shall, on or before the first day of January of each year, report in writing to the governor such defects and omissions in the constitution and laws as they may find to exist, together with appropriate forms of bills to cure such defects and omissions in the laws."—Art. VI, s. 31, of the Constitution of 1870.

⁷ "The officers of the executive department and of all the public institutions of the State shall, at least ten days preceding each regular session of the legislature, severally report to the governor, who shall transmit such reports to the legislature, together with the reports of the judges of the

produces it almost verbatim.⁸ Since then it has appeared, with various minor changes, in the Florida constitution of 1885,⁹ the Idaho constitution of 1889,¹⁰ the Washington constitution of 1889,¹¹ and the Utah constitution of 1895.¹² One broad distinction may be noticed—the governor, or (in Florida) the attorney-general, may be free to submit to the legislature only such part of the judicial suggestions as he deems advisable (Florida, Illinois, Utah, Washington), or he may be required by the constitution to transmit the report and suggestions entire (Colorado, Idaho, Nebraska). In the form in which this power of suggesting legislation is found in the Venezuelan constitution of 1904, the executive department has no share in it at all. The supreme court includes in its biennial report to the National Congress a statement of the elements unfavorable to a uniformity in civil, criminal and commercial legislation.¹³ The Panama constitution of 1904 goes farther still, for it prohibits the enactment of legislation of a civil nature or touching judicial procedure except upon the suggestion of the special committees of the Assembly, or of the justices of the supreme court of justice.¹⁴ An investigation of the working of these devices is not within the scope of this work.¹⁵

supreme court, of defects in the constitution and laws.”—From Art. V, s. 22, of the Constitution of 1875.

⁸ See Art. VI, s. 27.

⁹ Art. V, s. 13.

¹⁰ Art. V, s. 25.

¹¹ Art. IV, s. 25.

¹² Art. VIII, s. 22.

¹³ “Los inconvenientes que, á su juicio, se opongan á la uniformidad de la legislación civil, criminal y mercantil.”—Art. 96.

¹⁴ “Exceptúanse de esta disposición las leyes sobre materia civil y procedimiento judicial, que no podrán ser modificadas sino á propuesta de las Comisiones especiales de la Asamblea, ó de los Magistrados de la Corte Suprema de Justicia.”—From Art. 98.

¹⁵ However, an evidence that the Colorado provision is not a dead letter may be found in the 1897 message of Governor McIntire: “I herewith transmit five several bills prepared by the honorable judges of the supreme

In some of the Central and South American republics, there is a still more intimate intermingling of the two departments, for the judiciary is entrusted with the actual exercise of certain legislative functions. They seem to lack only a vote in the assembly in a few instances. The initiative in the formation of bills upon judicial matters is assigned to them in Peru,¹⁶ Guatemala,¹⁷ San Domingo,¹⁸ Ecuador,¹⁹ Honduras,²⁰ and Nicaragua.²¹ The initiation of all legislation is given without restriction to the deputies, president and supreme court in Salvador,²² but in another article there is an indication that the justices are to use this right only to introduce reforms necessary to cure imperfections or deficiencies in the existing law which they have noted in applying it.²³ In Colombia the judges are even privileged to be heard in debate, on bills relating to civil matters or judicial procedure,²⁴ and the same result appears

court for the correction of certain defects in the laws of the state in obedience to Section 27 of Article VI, of the State constitution, and by them to me transmitted, together with certain resolutions passed at a meeting composed of seven district judges and one county judge, and by them reported to the judges of the Supreme Court, who in turn transmitted them to the executive. I recommend the passage of the bills transmitted and the consideration of the resolutions indicated."—HJ. 1897, p. 46.

¹⁶ Constitution of 1860, Art. 67.

¹⁷ Constitution of 1879, Art. 56.

¹⁸ Constitution of 1896, Art. 27.

¹⁹ Constitution of 1897, Art. 67.

²⁰ Constitution of 1904, Art. 76.

²¹ Constitution of 1905, Art. 64.

²² "Tienen exclusivamente la iniciativa de ley los Diputados, el Presidente de la República por conducto de sus Ministros y la Corte Suprema de Justicia."—Art. 71, of the Constitution of 1886.

²³ "Hacer uso del derecho de iniciativa manifestando directamente al Poder Legislativo la inconveniencia de las leyes y vacíos que hubiese notado para su aplicacion, indicando las reformas de que sean susceptibles."—Art. 102, s. 4.

²⁴ Constitution of 1886, Art. 84.

to be attained in Salvador,²⁵ Honduras,²⁶ and Nicaragua,²⁷ by a provision that bills (not introduced by the supreme court) modifying or repealing any section of the codes or affecting the administration of justice shall not be passed until the opinion of the supreme court has been heard. The congress may be empowered to fix a time limit for the giving of that opinion (as in Honduras) or the justices may choose their own time, within the current or following session, according to the importance and urgency of the measure (as in Salvador and Nicaragua). In Salvador the provision does not apply to laws of a political, economic or administrative order.

These schemes really differ but little from the advisory opinion as applied to the legislature. In effect we have here a compulsory advisory opinion upon certain kinds of pending bills.²⁸ The most salient objection to such an arrangement is that it makes a very serious demand upon the time of the judiciary. It would be unworkable in any State of the United States until the legislatures greatly curtail the number of bills considered in a single session. There can be no doubt that an advisory revision of pending bills by the judges would result in a marked improvement in the quality of our legislation, but an insistence upon higher standards in choosing legislators would obviate the need for such advice save in occasional instances. It is to be understood, of course, that the legislature is free in any case to pass finally upon the questions of policy

²⁵ Constitution of 1886, Art. 79.

²⁶ Constitution of 1904, Art. 83.

²⁷ Constitution of 1905, Art. 71.

²⁸ Cf. the provision included by the Iowa legislature of 1913 in its initiative and referendum proposal. The secretary of state shall submit all measures initiated by the people to the supreme court for an opinion concerning their constitutionality. The court must report within twenty days, and if the report is unfavorable as to constitutionality, the secretary of state must refuse to submit the measure to the people. Amer. Year Book 1913, p. 77.

involved, that is to decide whether it is advisable that the bill revised should be made law.

There is a middle ground between the compulsory form of advisory opinion just discussed and the optional form which exists in the United States. This is illustrated in the constitutional clauses of Colombia and Panama mentioned in an earlier chapter.²⁹ Here there is a compulsory reference to the supreme court only when there is an open disagreement between the legislature and the president as to the *constitutionality* of a measure awaiting the latter's signature. This seems very commendable. If there is a real difference of opinion between these two governmental organs upon the question of constitutionality, the ideal method of settlement is for the judiciary to decide. That is precisely the question they *will* decide anyway in case of subsequent litigation involving the measure,³⁰ and why should they not decide it while the matter is *res integra*? Certainly a subsequent repassage of the bill by a two-thirds majority in both houses is not very satisfactory proof that it *is* constitutional, and, as we well know, will count for nothing with a court in its dealing with the law later. In the two constitutions mentioned, the decision of the court in favor of the bill's constitutionality forces the executive approval, while an adverse decision retires it "to the archives." This is a perfectly logical result. If the president's sole objection is that the measure is unconstitutional and the court disagrees with him, his approval should inevitably follow. On the other hand, if the court agrees with the executive, the bill should fail. There is no reason why the judgment of either the executive or legislature should prevail against that of the other two departments of government. If the executive disapproves the bill partly on constitutional and partly on political grounds, the situation is more complex. A sound political science would seem to require that both approval of the bill by the supreme court

²⁹ See p. 94 *supra*.

³⁰ Under the American doctrine of "judicial supremacy."

and its repassage by two-thirds of the legislature should be necessary to command the executive sanction and promulgation. An arrangement of this description would probably prevent some of the chief executives of our States sheltering their political objections to a measure behind alleged unconstitutionality, as they occasionally do at present.

Lastly, it will not be amiss to point out that the judges may be called upon to advise officials of the other departments constituted for the time being as a court and performing functions of a judicial nature. We have seen how the House of Lords, when sitting as a court, has commanded the assistance of the English judges from the Middle Ages to the present day.³¹ Similarly, after our separation from England, the upper house of our different legislatures was often joined with the judges in the exercise of a judicial function. In one State, the upper house and the judges formed the highest court of appeal.³²

More commonly the upper house is made the court of impeachment, and it may be required that the judges assist them regularly,³³ or that the chief justice preside over the court when the chief executive is being tried, as in the federal constitution.³⁴ That the chief justice is present in an advisory capacity and not as a regular member of the court is made clear by the reservation in the New Hampshire constitution that he shall "have no vote therein." Hamilton, in explaining why the supreme court was not combined with the senate to form a court of impeachment in the federal constitution, says if the chief justice presides over the court "the benefits of that union will be obtained . . . while the inconveniences of an entire incorporation . . . will be substantially avoided."³⁵ Relations of somewhat the same nature existed between the judiciary

³¹ See pp. 18-25 *supra*.

³² N. Y. Constitution of 1777, Art. 32.

³³ N. Y. Const. *ibid.*, and South Carolina Const. of 1778, Art. 23.

³⁴ N. H. Const. of 1792, Sec. 40; and Conn. Const. of 1818, Art. IX, s. 2.

³⁵ The Federalist, No. LXV.

and executive in those rare instances where the latter performed judicial duties. Pennsylvania, in the constitution of 1776, made the president and council the court of impeachments and gave them the privilege of "taking to their assistance, for advice only, the justices of the supreme court."³⁶ Vermont adopted precisely the same plan in 1777.³⁷ In neither State did it survive for very many years. Pennsylvania discarded it in 1790. In Vermont it was continued in the constitutions of 1786 and 1793,³⁸ but was changed by an amendment in 1836.³⁹ No similar clause is found in existing State constitutions, but the New York constitution still provides that the court of impeachment shall consist of the senate and the judges of the highest court,⁴⁰ and it is very common to require that the chief justice shall preside either in general or at the impeachment of certain officials.

³⁶ Sec. 20, of the Frame of Government.

³⁷ Sec. 18, of the Frame of Government.

³⁸ Sec. 11, of the Frame of Government.

³⁹ Poore, 1884.

⁴⁰ Art. VI, s. 13.

CHAPTER V

THE PLACE OF THE ADVISORY OPINION

In the pure despotic monarchy of the Middle Ages, the government, i.e., the monarch, knew no limitations. State and government were identical. The increasing complexity of the problems in later political societies, together with the crystallization of that intangible ethos we call democratic consciousness, in the course of time forced a division of governmental tasks, an apportionment of duties functionally different *inter se* to different state officials. As these departments become established, they attain the dignity of state organs. The number of departments is of no significance. A priori, a quadruplication or a dualism in government could be elaborated as easily and as logically as the present tripartite arrangement. It is in a sense accidental that an imperfect trichotomy of the eighteenth century suggested the ideal of Montesquieu which has been a guiding star to the republics of the two Americas.

One of the most noteworthy results of the separation of powers theory¹ is the erection of a relatively independent department of government known as the judiciary. Stated broadly, its function is to interpret and apply the law of the land. This involves determining what is the law of the land as well as expounding its meaning. But in the United States constitutional system it is understood that the judges are not authorized to declare and explain the law, in the exercise of their judicial powers, save on certain occasions. They must act only when real litigations are brought before them for settlement. If they "pronounce upon a law without resting upon a case, (they) clearly step beyond (their) sphere, and invade that of

¹ For a brief statement of the theory as it is understood by publicists in the United States, see pp. 168-169 *supra*.

legislative authority."² Furthermore, it is considered essential that the adjudication be followed (if necessary) by an execution carrying it into effect.³ In strict law, then, a decision will not be given unless it will be a final pronouncement upon the rights of the parties to an action, nor will a decision be given upon points not necessarily involved in dealing with the pending case, even at the request of another department of government.⁴ But perhaps an exception may be made where there is an important question that affects the public, if an opinion is necessary to prevent future conflicting decisions.⁵

In the strict exercise of the judicial power just described, the judges are inevitably brought into contact with the other departments in many ways. They may often clash with the law-giving body through a disagreement as to the constitutional limitations imposed upon legislation. It is possible that they may have to decide which of two bodies is the lawful legislature, in order to know what is law.⁶ More frequently the executive department will feel the weight of judicial authority, since practically all executive officials may be summoned before a court to answer for wrongs committed against a private citizen. The title by which they claim to hold office may be questioned, they may be enjoined from the performance of certain acts, they may be commanded to carry out certain tasks. The president is beyond the reach of the judiciary and can be brought to account only by impeachment. This seems to be true of the governor too in some States⁷ but there is a conflict of authority on the question.⁸

² De Tocqueville, *Dem. in Amer.* I, Ch. 6.

³ *Taylor v. Place*, 4 R. I. 324; *Gordon v. U. S.*, 117 U. S. 697, at p. 704.

⁴ *Wyatt v. State Board of Equalization*, 74 N. H. 552; *State v. Baughman*, 38 Ohio State, 455; and cf. *Queen v. Robertson*, 6 Can. S. C. R. 127.

⁵ *Matter of Madden*, 148 N. Y. 136; *Matter of Emmett*, 150 N. Y. 538; *Matter of Fairchild*, 151 N. Y. 359; and *Matter of Norton*, 158 N. Y. 130.

⁶ *Statement and Questions Submitted, etc.*, 70 Me. 600.

⁷ *People ex rel. v. Bissell*, 19 Ill. 229.

⁸ *Baldwin*, *American Judiciary*, p. 48, and see *In the matter of Hughes*, 61 N. C. 57.

Furthermore the activities of members of the judiciary are not confined to labors that are purely judicial in character. "It is safe to assert that in no State are the functions of the courts purely judicial."⁹ There are many governmental tasks other than the adjustment of private disputes in litigated cases which call for the consistent, analytical treatment characteristic of the legal mind—tasks for which the judges are pre-eminently fitted, and which they could perform more readily than other officials. So legislators have found the judiciary "a convenient depositary of many quasi-legislative and quasi-executive functions."¹⁰ It is not easy to determine how far the judiciary will acquiesce in such a deposition.¹¹ There is no general principle, but a number of isolated rules may be found in different States. It seems settled both in the State and federal governments that the legislature cannot require a court to go through the form of a trial and pass upon private claims, where the decision is advisory only and subject to legislative or executive review.¹² In other words, if the legislature intends to impose judicial duties upon the courts, it must provide for their exercise in a judicial manner.¹³ The legislature should not exercise judicial powers at all.¹⁴ Conversely, the judiciary will do nothing which will be a clear interference with the independent rights and duties of the other departments,¹⁵ or will be merely a criticism of a coordinate branch of the government.¹⁶

⁹ Baldwin, *op. cit.*, p. 22.

¹⁰ Baldwin, *op. cit.*, p. 23.

¹¹ In some States it has been said that the legislature could not impose non-judicial duties upon the judges at all. In the matter of the Application of the Senate, 10 Minn. 78; and In re Opinion of the Judges, 25 Okla. 76.

¹² *Dinan v. Swig*, 223 Mass. 516.

¹³ *Hayburn's Case*, 2 Dall. 409; and cf. *U. S. v. Yale Todd*, reported as a note to *U. S. v. Ferreira*, 13 How. 40.

¹⁴ *Taylor v. Place*, 4 R. I. 324.

¹⁵ *State v. Fleming*, 70 Nebr. 523; *Reply of the Judges, etc.*, 33 Conn. 586; and *Opin.s of the Justices, etc.*, 64 N. C. 785.

¹⁶ *Opin. of the Justices*, 56 N. H. 574; and *In re SR. No. 4*, 54 Colo. 262.

It is common knowledge that the separation of powers in the United States is far from complete. Each department performs many tasks that do not properly fall within its jurisdiction, and very often the same set of facts will be dealt with by different departments. Also it is generally recognized that a complete separation of powers would not merely be impracticable, but fatal to the state wherein it existed. But where should we draw the line? It would be difficult to generalize so as to cover all possible cases. Each must be decided with reference to the attendant circumstances. But one fundamental guiding principle should be kept before our eyes at all times—the separation of powers should be an instrument both of democracy and of efficiency. There are daily evidences that the separation has gone too far in the United States, that it is responsible for a great waste of governmental energy. We witness a deplorable lack of co-operation between the different organs of the state, a deficiency of which the expense to the people is enormous. The legislature makes blind appropriations, sometimes extravagant, sometimes inadequate, for executive expenses. Laws are brought into existence at much travail and expense only to be declared nullities as soon as brought before the court of last resort. Professor Baldwin estimates that one out of every three hundred statutes passed by our law-making bodies is declared never to have been law at all.¹⁷ What is still worse, often these unconstitutional “laws” go unimpeached for years, while private rights are based upon their validity, only to meet disaster in the crucial test. Meanwhile, in our jurisprudence, there is a conclusive presumption that every citizen, including the officials of the executive and legislative departments, knows the law, although in fact it is impossible for anyone to know it.¹⁸

Lack of space forbids detailing more of the innumerable examples of a failure of our governmental organs to work to-

¹⁷ Amer. Judiciary, p. 107.

¹⁸ “Since the doubtful point may be the true construction of the fundamental law of the Union, the President and Congress may be left in un-

gether; they are within the knowledge of every reader. Embarrassments, tangles, missteps, inconsistencies, discords are of every-day occurrence in our public affairs, and they all spell waste. The greatest problem before political scientists today is to reconcile democracy and efficiency. The world has made marked progress in solving that difficult problem of the reconciliation of government with liberty of which Professor Burgess has written so entertainingly in his recent book.¹⁹ This critical student of political society declares that the American theory of government offers the most satisfactory solution of his problem that has yet appeared, and that the solution rests fundamentally on a separation of powers which entrusts the guardianship of individual rights to a fearless and independent judiciary. With this we agree; but the solution has been productive of another problem, for the economic principle of a division of labor is only a success when all the groups are complementary, working in harmony towards a common end. It is as if there were three cragsmen roped together for the ascent of a cliff. The success of the expedition depends upon the mutual helpfulness of all the individuals. If each one, instead of anticipating the difficulties ahead of his companions and suggesting methods for circumventing them, contents himself with commenting on reverses only when they are suffered and criticizing past errors, what a wealth of effort goes to waste. And surely no independence is sacrificed by such helpfulness—each is still a “check” upon the others in time of necessity. Our present political problem is to build up a cordial sympathy and mutual co-operation between the three departments without affecting the solution of Professor Burgess’ problem, i.e.,

certainty as to how they shall shape their course. With the best wish in the world to act conformably to the Constitution, these authorities have no means of ascertaining before they act what, in the view of its authorized interpreters, the true meaning of the Constitution is.”—Bryce, *Amer. Commonwealth*, I, pp. 352-3.

¹⁹ *Reconciliation of Government with Liberty* (1915).

without interfering with the domain of individual liberty under the constitution or the independence of the judiciary.

Will the advisory opinion be a desirable step in that direction? Before we attempt to answer this question categorically, let us review summarily the arguments for and against the device as they have been brought out by the practice in our country. As generally understood, the advisory opinion is an opinion rendered by the highest judicial officers in the state, acting as individuals and not in a judicial capacity, in response to a request for information as to the state of the law or counsel as to the constitutionality of proposed action, coming from the legislative or executive branches of the government. The form in which its usefulness appears varies with the question asked. In connection with pending legislation, it is designed to improve the form of bills, to make for perspicuity, consistency and satisfactory technic, to reduce the possibility of enacting statutes that will have to be declared null and void. In connection with completed legislation, it is valuable as indicating to the legislative department the need for further legislation, as furnishing to the executive department a construction that will insure a consistent and, in all probability, correct administration of the statute, as informing the people whether what appears to be law is actually binding upon them, in whole or in part. Why should it be necessary for these groups to be unenlightened by the wisdom of the chosen judicial servants of the state, until some individual is willing to devote enough time and money to bring the matter up in connection with a particular set of facts? We know too that there are many public questions that can with difficulty be brought before a court in a regular case. Not only would an opinion often prevent errors on the part of the public, doing away with a great deal of uncertainty and confusion, but it would in many instances save the taxpayers considerable expense. The cost of enacting an unconstitutional statute and then going through the process of getting it declared unconstitutional is a dead

loss to the state's treasury. Again, suppose the governor contemplates calling an extra session of the legislature, if he is not satisfied that certain things are prohibited or secured in the existing statutes, as in *In re Opinion of the Justices*, 73 New Hampshire, 625. Is it not worth while economically to assure him upon this point?

We have dealt in detail with the principal objections which have been raised against advisory opinions in the preceding pages. The complaint that legal assistance should be at hand is met by the employment of *amici curiae*. Indeed, if it is known that certain parties are interested in the question, they may be invited to send counsel to a public hearing on the questions of law involved. But, we are told, questions of law should be settled with reference to particular facts, never in the abstract. We may set off against this the view of a North Carolina chief justice that "the question is more easy of solution now, when it can be treated as a dry matter of constitutional law, than it might be hereafter, when complicated with collateral considerations."²⁰ An even more convincing answer is that the questions are not "settled" once and for all. They are settled provisionally as it were. The probability is that the opinion will prevail in later cases, for the reason that in all probability it is correct. However, subsequent litigants are in no wise hindered from demanding a reconsideration in the light of their particular case. That is the beauty of the scheme. Though it binds no one—judges, interrogator or public—still it will carry the weight of high judicial prestige and will usually be followed by everyone concerned. Still this has been the crucial objection of some critics. They complain that opinions given extra-judicially will inevitably influence judicial action in later cases; subordinate judges would not venture to disregard the opinions of their brethren in the supreme court, and these latter justices, if not insensibly biassed by their earlier conclusions, will be

²⁰ *Opin.s of the Justices, etc.*, 64 N. C. 785.

slow to overcome the pride of first convictions and admit that they have changed their minds. It is supposed that the rights of later litigants will at least be prejudiced, if not prejudged. There are two points of weakness in this attack. The first has just been mentioned—there is no obligation upon any member of the judiciary to adopt the principles stated in an advisory opinion. Therefore higher and lower judges alike should treat advisory opinions merely as evidence of truth. There can be no harm in this. A careful and impartial judge will naturally welcome any expositions or considerations that will assist him in reaching a correct conclusion. Why should the studied reasoning and thoughtful pronouncements of his learned predecessors not play an important part in his investigations? Why should his own opinions when the question was first presented to him not serve as a starting point for renewed examination, if, as an experienced judge, he is ever mindful that human reasoning is potentially erroneous? The decisions in one State are not binding upon the judges of another State; yet they command respectful attention and in many cases are followed without qualification. It is by no means unknown for *dicta* to grow into rules by judicial adoption and application in a proper case. The explanation of the hearing given to *dicta* and extra-territorial decisions is a justification for the deference to advisory opinions as well. All three merit the regard of judges in proportion as they embody learning and logic that appeal to the convictions. This brings us to the second weakness in the indictment. The statement that private rights will suffer injury from advisory opinions assumes a superficiality and incorrectness in such opinions. Injury could scarcely result from a correct statement of the law. Now as a matter of fact advisory opinions have been remarkably sound. We do not hesitate to say the proportion of “over-ruled” opinions is as low as that of over-ruled cases of the same difficulty. Why should this not be so as a rule? It must not be assumed that the brevity of an opinion connotes slight

investigation.²¹ Many of them bear evidences of much thought and research. It is quite common for the opinion to be rested entirely upon regular cases cited therein. The amount of possible injury to private rights inherent in such opinions is surely minimal, and insignificant as compared with the great benefit to the commonwealth as a whole.

The judges themselves have not always looked upon the scheme with favor. Now and then they have expressed their appreciation of the honor done them by inquiries from the coordinate branches of the government,²² and have complied with the requests quite "cheerfully."²³ Even though not required to answer by the constitution, the North Carolina justices in one case acknowledged that to reply would be merely a duty of courtesy and respect.²⁴ The Massachusetts justices on the whole have been very liberal in the advisory opinion practice,²⁵ and the clause seems to have operated very successfully in that State.²⁶ But the tendency of the judges in most jurisdictions is to discourage the practice.²⁷ They have in some States dealt harshly with constitutional advisory opinion clauses, and in one instance where the judges refused to comply with a statute authorizing these opinions, they went out of their way to say that a constitutional clause on the same subject

²¹ E.g., see the reporter's note in *Opin. of the Justices*, 52 N. H. 622; and the remarks of Hayt, C. J., in *Parks v. Soldiers' and Sailors' Home*, 22 Colo. 86.

²² *Opin. of the Justices*, 126 Mass. 547; and *Opin. of the Justices*, 126 Mass. 557.

²³ *Opin. of the Justices*, 5 Metc. 591; and *In re Railroad Commissioners*, 15 Nebr. 679.

²⁴ *Opin. of the Justices*, 31 N. C. App.

²⁵ "The Justices have manifested no disposition to analyze nicely or construe narrowly their duty under the Constitution to give opinions to the other departments of government. They always have interpreted broadly the duty imposed, as is necessary in the consideration of a great charter of government."—*In re Opin. of the Justices*, 214 Mass. 602.

²⁶ See p. 38 *supra*.

²⁷ See Albany L. J. LIX, p. 21.

"does not address itself to our minds with any favor."²⁸ The reasons given for this opposition do not seem very substantial, as we have tried to show. We confess it is not particularly surprising that the judges take this position. No profession is more circumscribed by traditional limitations. The concept of precedent is the corner-stone of judicial habits of thought. This has its advantages. It has made the judiciary the greatest conservative element in our political societies. But it can be carried too far. We have seen recently in the United States that too stubborn an unresponsiveness to changed conditions may bring about a popular censorship of particular judges or decisions that is dangerous in the extreme to sound constitutional theory. Also, apart from theoretical antagonism, the judges cannot fail to be reluctant to undertake a task that will often be onerous, embarrassing and unpleasant. But this reluctance should be overcome if the task is a duty, the performance of which will contribute to the making of a more efficient governmental system. The advisers will be sufficiently protected in ordinary cases, if they will insist with one voice that their opinions are advice and nothing more. In embarrassing situations, a representation to the questioner that it is undesirable to reply would usually produce an acquiescent withdrawal. Finally it cannot be supposed that the people would permit a gross abuse of the consultative function to go unchecked.

We conclude that there is a presumption in favor of the advisory opinion as a useful instrument of government. It seems justified in theory; it has proved its value in practice. In solving the big governmental problem of the day, it is a step in the right direction. It is one of the few surviving agencies that made for efficiency in the monarchical form of government. Is it not possible that it may yet serve the same purpose equally well in our democracies?

²⁸ In the matter of the Application of the Senate, 10 Minn. 78.

APPENDIX I

THE ADVISORY OPINION CLAUSES OF THE STATE CONSTITUTIONS IN CHRONOLOGICAL ORDER

Massachusetts

"Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the Supreme Judicial Court upon important questions of law, and upon solemn occasions."—Part 2, Chapt. III, Art. 2, of the Constitution of 1780. Poore, 968.

New Hampshire

"Each branch of the legislature, as well as the president and council, shall have authority to require the opinions of the justices of the Superior Court upon important questions of law, and upon solemn occasions."—From the Article on the Judiciary, in the Constitution of 1784. Poore, 1290.

This was repeated as Section 74 of the Constitution of 1792, with "governor" substituted for "president." In this form it was repeated as Article 73 of Part 2 in the Constitution of 1902. Poore, 1305, and Thorpe, IV, 2509.

Maine

"They shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate, or house of representatives."—Article VI, Section 3, of the Constitution of 1820. Poore, 796.

Rhode Island

"They shall also give their written opinion upon any question of law, whenever requested by the governor, or by either house of the general assembly."—Article X, Section 3, of the Constitution of 1842. Poore, 1611.

This was reaffirmed in a judicial amendment (Amendment XII, Section 2) adopted November 3, 1903. Thorpe, VI, 3240.

Missouri

"The judges of the Supreme Court shall give their opinion upon important questions of constitutional law, and upon solemn occasions, when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decisions of said court." Article VI, Section 11, of the Constitution of 1865. Poore, 1149.

Florida

"The governor may at any time require the opinion of the justices of the Supreme Court as to the interpretation of any portion of this constitution, or upon any point of law, and the Supreme Court shall render such opinion in writing." Article VI, Section 16, of the Constitution of 1868. Poore, 352.

"The governor may at any time require the opinion of the justices of the Supreme Court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties, and the justices shall render such opinion in writing." Article VI, Section 16, as changed by Amendment XI, of 1875. Poore, 368. In this form it was repeated as Article IV, Section 13, of the Constitution of 1885. Thorpe, II, 740.

Colorado

"The Supreme Court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decisions of said court." This was an Amendment to Article VI, Section 3, adopted on November 2, 1886. Vide L. 1887, p. 483. Mills Ann. St. 1912, I, c. 132. (This is carelessly omitted from Thorpe's Constitutions.)

South Dakota

"The governor shall have authority to require the opinions of the judges of the Supreme Court upon important questions of law involved in the exercise of his executive powers and upon solemn occasions." Article V, Section 13, of the Constitution of 1889. Thorpe VI, 3366.

APPENDIX II

THE ADVISORY OPINION STATUTES OF THE DOMINION OF CANADA AND THE CANADIAN PROVINCES

Dominion of Canada

"The Governor in Council may refer to the Supreme Court for hearing or consideration, any matter which he thinks fit to refer; and the court shall thereupon hear and consider the same and certify their opinion thereon to the Governor in Council; provided that any judge or judges of the court who differ from the opinion of the majority may, in like manner, certify his or their opinion or opinions to the Governor in Council." This is the provision of the Supreme Court Act (38 Vic. c. 11) as incorporated in the Revised Statutes of 1886 (R. S. C. 1886, c. 135, Section 37).

"Important questions of law or fact touching provincial legislation, or the appellate jurisdiction as to educational matters vested in the Governor in Council by the 'British North America Act, 1867,' or by any other act or law, or touching the constitutionality of any legislation of the Parliament of Canada, or touching any other matter with reference to which he sees fit to exercise this power, may be referred, by the Governor in Council, to the Supreme Court for hearing and consideration; and the court shall thereupon hear and consider the same.

2. The court shall certify to the Governor in Council, for his information, its opinion on questions so referred, with the reasons therefor, which shall be given in like manner as in the case of a judgment upon an appeal to the said court, and any judge who differs from the opinion of the majority shall, in like manner, certify his opinion and his reasons.

3. In case any such question relates to the constitutional validity of any Act which has heretofore been or shall hereafter be passed by the legislature of any province, or any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the Attorney General of such province . . . shall be notified of the hearing, in order that he may be heard if he thinks fit.

4. The court shall have power to direct that any person interested, or where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing upon any reference under this section, and such persons shall be entitled to be heard thereon.

5. The court may, in its discretion, request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance . . . out of any moneys appropriated by Parliament for expenses of litigation.

6. The opinion of the court upon any such reference, although advisory only, shall, for all purposes of appeal to Her Majesty in Council, be treated as a final judgment of the said court between parties." 54-5 Vic., c. 25, s. 4.

"Important questions of law or fact touching (a) the interpretation of the 'British North America Acts' 1867 to 1886; or, (b) the constitutionality or interpretation of any Dominion or provincial legislation; or, (c) the appellate jurisdiction as to educational matters, by the 'British North America Act, 1867,' or by any other Act or law vested in the Governor in Council; or, (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or the respective governments thereof, whether or not the particular power in question has been or is proposed to be executed; or, (e) any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question; may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question.

2. When any such reference is made to the court, it shall be the duty of the court to hear and consider it, and to answer such question so referred; and the court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the court; and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons." 6 Edw. VII, c. 50, incorporated as Sec. 60 of R. S. C. 1906, c. 139. The other sections are essentially identical with ss. 3-6 above.

"The court, or any two of the judges thereof, shall examine and report upon any private bill or petition for a private bill presented to the Senate or House of Commons, and referred to the court under any rules or orders made by the Senate or House of Commons." R. S. C. 1906, c. 139, Section 61.

Ontario

An Act for expediting the decision of Constitutional and other provincial Questions. (R.S.O. 1897, c. 84)

"1. The Lieutenant-Governor in Council may refer to the Court of Appeal or to the High Court for hearing or consideration any matter which he thinks fit to refer, and the Court shall thereupon hear or consider the same. 53 Vic. c. 13, s. 1.

2. The Court is to certify to the Lieutenant-Governor in Council its opinion on the question referred, with the reasons therefor which are to be given in like manner as in the case of a judgment in an ordinary action; and any Judge who differs from the opinion of the majority may in like manner certify his opinion with his reasons therefor to the Lieutenant-Governor in Council. 53 Vic. c. 13, s. 2.

3. In case the matter relates to the constitutional validity of any Act which has heretofore been or shall hereafter be passed by the Legislature of this Province, or of some provision in any such Act, the Attorney-General of Canada shall be notified of the hearing in order that he may be heard if he sees fit. 53 Vic. c. 13, s. 3.

4. The Court shall have power to direct that any person interested, or where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing, and such persons shall be entitled to be heard. 53 Vic. c. 13, s. 4.

5. Where any interest affected is not represented by counsel, the Court may in its discretion request some counsel to argue the case in such interest, and the reasonable expenses thereof shall be paid out of the Suitors' Fee Fund or otherwise. 53 Vic. c. 13, s. 5.

6. The opinion of the Court shall be deemed a judgment of the Court, and an appeal shall lie therefrom as in the case of a judgment in an action. 53 Vic. c. 13, s. 6.

7. In case of the matter being appealed from the High Court to the Court of Appeal, sections 2, 3, 4, 5 and 6 shall apply in like manner as if the original reference had been to the Court of Appeal. An appeal to Her Majesty in Her Privy Council from a judgment of any Court on a reference under this Act shall not be subject to the restrictions contained in the Revised Statute of this Province respecting appeals to Her Majesty in Her Privy Council. (Rev. Stat. c. 48) 53 Vic. c. 13, s. 7."

Nova Scotia

Of the decision of constitutional and other provincial questions. (R. S. N. S. 1900, c. 166)

"1. The Governor-in-Council may refer to the Supreme Court of Nova Scotia, for hearing or consideration, any matter which he thinks fit to refer, and the court shall thereupon hear and consider the same. 1890, c. 9, s. 1.

2. The court shall certify to the Governor-in-Council its opinion on the matter referred, with the reasons therefor, which are to be given in like

manner as in the case of a judgment in an ordinary action; and any judge who differs from the opinion of the majority shall, in like manner, certify his opinion, with his reasons therefor, to the Governor-in-Council. 1890, c. 9, s. 2.

3. If the matter relates to the constitutional validity of any Act which has heretofore been, or hereafter is passed by the legislature of this province, or of any provision in any such Act, the Attorney-General of Canada shall be notified of the hearing, in order that he may be heard if he thinks fit. 1890, c. 9, s. 3.

4. The court shall have power to direct that any person interested, or, where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing, and such persons shall be entitled to be heard. 1890, c. 9, s. 4.

5. Where any interest affected is not represented by counsel, the court may, in its discretion, request counsel to argue the case in such interest, and the reasonable expenses thereby occasioned shall be paid out of the general revenues of the province. 1890, c. 9, s. 5.

6. The opinion of the court upon any such reference, although advisory only, shall, for all purposes of appeal to the Supreme Court of Canada, or to Her Majesty-in-Council, be treated as a final judgment of the court between parties. 1890, c. 9, s. 6."

Manitoba

"1. The Lieutenant Governor in Council may refer to the Court of Queen's Bench, or to a judge, for hearing and consideration, any matter which he thinks fit to refer, and the Court of Queen's Bench or judge shall thereupon hear and consider the same. 1891, c. 28, s. 1.

2. The court or judge is to certify to the Lieutenant Governor in Council its or his opinion on the question referred, with the reasons therefor, which are to be given in like manner as in the case of a judgment in an ordinary action; and any judge who differs from the opinion of the majority may, in like manner, certify his opinion, with his reasons therefor, to the Lieutenant Governor in Council. 1891, c. 28, s. 2.

3. In case the matter relates to the constitutional validity of any Act which has heretofore been, or shall hereafter be, passed by the legislature of this province, or of some provision in any such Act, the Attorney General of Canada shall be notified of the hearing, in order to be heard if he sees fit. 1891, c. 28, s. 3.

4. The court or judge shall have power to direct that any person interested, or where there is a class of persons interested, one or more persons as representative of such class, shall be notified of the hearing, and such persons shall be entitled to be heard. 1891, c. 28, s. 4.

5. Where any interest affected is not represented by counsel, the court or judge may in its or his discretion request some counsel to argue the case in such interest, and the reasonable expenses thereof shall be paid by the Provincial Treasurer. 1891, c. 28, s. 5.

6. The opinion of the court or judge shall be deemed a judgment of the court, and an appeal shall lie therefrom as in the case of a judgment in an action. 1891, c. 28, s. 6."

Note: These provisions were originally enacted as 53 Vic. c. 16, ss. 1-6

British Columbia

"11. The Lieutenant Governor in Council may refer to the Full Court, or to a judge, for hearing and consideration, any matter which he thinks fit to refer, and the Full Court or judge shall thereupon hear and consider the same. R. S. B. C. 1897, c. 56, s. 98.

12. The court or judge is to certify to the Lieutenant Governor in Council its or his opinion on the question referred, with the reasons therefor, which are to be given in like manner as in the case of a judgment in an ordinary action; and any judge who differs from the opinion of the majority may, in like manner, certify his opinion, with his reasons therefor, to the Lieutenant Governor in Council. R. S. B. C. 1897, c. 56, s. 99.

13. In case the matter relates to the constitutional validity of any Act which has heretofore been, or shall hereafter be, passed by the legislature of this province, or of some provision in any such Act, the Attorney General of Canada shall be notified of the hearing, in order to be heard if he sees fit. R. S. B. C. 1897, c. 56, s. 100.

14. The court or judge shall have power to direct that any person interested, or where there is a class of persons interested, one or more persons as representative of such class, shall be notified of the hearing, and such persons shall be entitled to be heard. R. S. B. C. 1897, c. 56, s. 101.

15. The opinion of the court or judge shall be deemed a judgment of the court, and an appeal shall lie therefrom as in the case of a judgment in an action. R. S. B. C. 1897, c. 56, s. 102.

16. The reasons given by the court or members thereof, or the judge, for any judgment under this Act shall, as soon as practicable thereafter, be published in the Brit. Col. Gazette. R. S. B. C. 1897, c. 56, s. 103."

The above provisions were originally enacted as L. 1891, c. 5, ss. 1-6. By L. 1907, c. 12, ss. 4-6, "Court of Appeal" was substituted for "Full Court" or "Court" as the Supreme Court was replaced by the Court of Appeal by L. 1907, c. 10. In that form the entire act was reenacted as R. S. B. C. 1911, c. 45.

Quebec

Questions referred to the Court of King's Bench by the Lieutenant-Governor in Council. (R. S. Q. 1909, Title III, c. 3)

"579. The Lieutenant-Governor in Council may refer to the Court of King's Bench, Appeal side, for hearing and consideration, any question which he deems expedient, and thereupon the court shall hear and consider the same. 61 V., c. 11, s. 1.

580. The court shall send to the Lieutenant-Governor in Council for his information its opinion duly certified upon the questions so referred, giving its reasons in support thereof, in like manner as in the case of judgments rendered upon appeals brought before the said court.

Any judge who differs from the majority shall, in like manner, give his opinion duly certified and his reasons in support thereof. 61 V., c. 11, s. 2.

581. The court may order that any person interested, or if there is a class of persons, any one or more persons as representing such class, be notified of the hearing upon any reference to the court under this chapter; and such persons are entitled to be heard. 61 V., c. 11, s. 3.

582. The opinion of the court upon any question referred to it under this chapter is advisory only and cannot be appealed from. 61 V., c. 11, s. 4.

583. The majority of the judges of the Court of King's Bench may make the rules of practice necessary for carrying out the provisions of this chapter.

The chief-justice of the Court of King's Bench, or if he be absent or sick, any other judge of that court, may fix any day or days, in or out of term, for the hearing, consideration and decision of the question referred under the authority of this chapter. 61 V., c. 11, s. 5."

Saskatchewan

An Act respecting the Decision of Constitutional and other Legal Questions. (R. S. S. 1909, c. 57)

"1. The Lieutenant Governor in Council may refer to the supreme court of Saskatchewan for hearing or consideration any matter which he thinks fit to refer and the court shall thereupon hear or consider the same. 1901, c. 11, s. 1.

2. The court is to certify to the Lieutenant Governor in Council its opinion on the question referred with the reasons therefor which are to be given in like manner as in the case of a judgment in an ordinary action; and any judge who differs from the opinion of the majority may in like manner certify his opinion with his reasons therefor to the Lieutenant Governor in Council. 1901, c. 11, s. 2.

3. In case the matter relates to the constitutional validity of any Act which has heretofore been or shall hereafter be passed by the Legislature

or of any Ordinance passed by the Legislative Assembly of the North-West Territories or of some provision in any such Act or Ordinance the attorney-general for Canada shall be notified of the hearing in order that he may be heard if he sees fit. 1901, c. 11, s. 3.

4. The court shall have power to direct that any person interested or where there is a class of persons interested any one or more persons as representatives of such class shall be notified of the hearing and such persons shall be entitled to be heard. 1901, c. 11, s. 4.

5. Where any interest affected is not represented by counsel the court may in its discretion request counsel to argue the case in such interest and reasonable expenses thereof shall be paid out of the general revenue fund. 1901, c. 11, s. 5.

6. The opinion of the court shall be deemed a judgment of the court and an appeal shall lie therefrom as in the case of a judgment in an action. 1901, c. 11, s. 6."

New Brunswick

"21. The Court shall have jurisdiction to entertain an action at the instance of either the Attorney General for the Dominion, or the Attorney General of this Province, for a declaration as to the validity of any statute, or any provision in any statute of this legislature, though no further relief should be prayed or sought; and the action shall be deemed sufficiently constituted if the two officers aforesaid are parties thereto. A judgment in the action shall be appealable like other judgments of the said Court." Judicature Act of 1906 (6 Edw. VII, c. 37).

This was reenacted as section 16 of the Judicature Act of 1909 (9 Edw. VII, c. 5).

APPENDIX III

ADVISORY OPINION PROVISIONS IN CENTRAL AND SOUTH AMERICAN STATES

Colombia

"If a bill should be objected to on the ground that it is unconstitutional it shall be excepted from the provisions of Article 88. (Permitting repassage by $\frac{2}{3}$ of both houses). In this case, if the houses insist, the bill shall pass to the Supreme Court, in order that this body, within six days, may decide upon its constitutionality. If the decision of the court should be favorable to the bill, the president shall give it his approval. If the decision should be unfavorable, the bill shall fail and be removed from the calendar." Article 90, of the Constitution of 1886. *Annals of Am. Acad.*, Jan. 1893, Supplement. See also Rodriguez, *American Constitutions*, II, 337.

Panama

"If the executive objects to a bill as unconstitutional, and the assembly insists on its passage, it shall be referred to the Supreme Court of Justice, which shall within six days decide upon its acceptibility. An affirmative answer by the court imposes the obligation upon the executive to sanction and promulgate the law. If it is negative, the project shall be placed in the archives." Article 105, of the Constitution of 1904. Rodriguez, *American Constitutions*, I, 415.

PROVISIONS DEALING WITH THE EXERCISE OF OTHER EXTRA-JUDICIAL FUNCTIONS BY THE JUSTICES IN CENTRAL AND SOUTH AMERICAN STATES

Colombia

"The judges of the Supreme Court shall be entitled to be heard in the discussion of bills relating to civil matters and judicial procedure." Article 84, of the Constitution of 1886. *Annals of Am. Acad.*, Jan. 1893, Supplement. See also Rodriguez, *American Constitutions*, II, 336.

Salvador

"Bills not introduced by the Supreme Court of justice, dealing with matters tending to reform or repeal any provision contained in the codes of the Republic, shall not be discussed without hearing the opinion of the said court, and this opinion shall be given either during the same session of the assembly or in the following year, as the importance, urgency or

length of the bill may demand. This provision is not applicable to laws of political, economic or executive order." Article 79, of the Constitution of 1886. Rodriguez, American Constitutions, I, 278.

Honduras

"Whenever a bill not originally emanating from the Supreme Court has for its object the reform or repeal of any provision in the codes of the Republic or of any law relating to the administration of justice, the opinion of that Court shall be requested, before entering into its discussion. The court shall give its opinion within the time which Congress may fix." Article 83, of the Constitution of 1904. Rodriguez, American Constitutions, I, 375.

Nicaragua

"No bill having for its object the amendment or repeal of any provision contained in the Civil, Penal, Commercial, Mining, or Procedure Codes of the Republic, not originating in the Supreme Court of justice, shall be discussed without first hearing the opinion of said court, said opinion to be given according to the importance, urgency, or magnitude of the reform, either during the same session of the assembly or in the next." Article 71, of the Constitution of 1905. Rodriguez, American Constitutions, I, 313.

APPENDIX IV

CASES CITED IN THE TEXT

It has seemed better to list the cases in chronological order in each state rather than to attempt an alphabetical arrangement where the names of so many cases are identical or at least very similar. The conventional name Opinion of the Justices is supplied for some cases which bear no name in the reports.

<i>England</i>			PAGE
Scire facias	Y. B. 12 & 13 Edw. III, Intro. ci-cv.	1340	3
Commission Case	Fortescue, 392	1388	8, 223
Northumberland's Case	Rot. Parl. 5 Hen. IV, Nos. 11 & 12	1403	20, 223
Earl of Arundel's Case	Rot. Parl. 27 Hen. VI, No. 18	1449	4, 20
Thorp's Case	13 Co. Rep. 63; Rot. Parl. 31 Hen. VI, Nos. 25, 26, 27 & 28	1453	20
Duke of York's Case	Rot. Parl. 39 Hen. VI, No. 12; Fortescue, 384	1460	21, 22, 223
Stafford's Case	Rot. Parl. 1 Hen. VII, Nos. 25 & 26; For- tescue, 389	1485	9, 16
Customs' Case	Hallam, Const'l Hist. I, p. 340 n	1614	26
Peacham's Case	Bacon's Works IV, pp. 593, 596, 601; 2 How. St. Tr. 871	1614	10, 16, 223
Owen's Case	Bacon's Works IV, pp. 321, 600	1614	12
Somerset's Case	Bacon's Works IV, pp. 616-25	1615	12
Commendams Case	Bacon's Works IV, pp. 631, 636	1616	9

270 DEPARTMENTAL COÖPERATION IN STATE GOVERNMENT

<i>England</i>			PAGE
Stroud, Long et al.	3 How. St. Tr. 235	1629	13
Beckman v. Maplesden	Bridg. 60	1662	14
Paty's Case, or The	14 East 92 n;	1704	4, 22, 149,
Aylesbury Case, or	14 How. St. Tr.		223
Ashby and White	695		
Whiston's Case	Burnet's Own Times, p. 867	1711	14, 223
Prince of Wales' Case	Fortescue, 401; 15 How. St. Tr. 1195	1717	8, 149
Schism Act Case	Fortescue, 385	1718	26, 27
Fenwick's Case	Fortescue, 385		8
Warships Case	Fortescue, 388	1721	27
Ferrer's Case	Foster's Cr. Law, p. 138	1760	22
Sackville's Case	2 Eden 371	1760	15, 16, 32, 149
Head v. Head	1 T. & R. 138	1823	24
In re London & Westminster Bank	2 Cl. & Fin. 191	1834	28, 29
McNaghten's Case	10 Cl. & Fin. 200	1843	28, 29, 30, 165, 201, 214
Bright v. Hutton	3 H. of L. 341	1851	24
In re Schlumberger	9 Mo. P. C. 1	1853	17, 166
Ex parte Co. Council of Kent & Council of Dover	(1891) 1 Q. B. 725	1891	18
Allen v. Flood	(1898) A. C. 1	1898	23
Trial of Earl Russell	(1901) A. C. 446	1901	23
<i>United States</i>			
Hayburn's Case	2 Dall. 409	1792	60, 61, 195, 250
U. S. v. Yale Todd	13 How. 52n	1794	60, 61, 250
Marbury v. Madison	1 Cr. 137	1803	162
Gibbons v. Ogden	9 Wheat. 1	1824	198
Osborn v. Bank of U. S.	9 Wheat. 319	1824	62
Wayman v. Southard	10 Wheat. 46		168
U. S. v. Ferreira	13 How. 40	1851	60, 61
Gordon v. U. S.	2 Wall. 561; 117 U. S. 697	1865	61, 62, 63, 249
U. S. v. Klein	13 Wall. 144	1872	63
U. S. v. Jones	119 U. S. 477	1886	63
Chicago, etc. R. R. Co. v. Wellman	143 U. S. 339	1891	62
In re Sanborn	148 U. S. 222	1892	64

<i>Colorado</i>			PAGE
Wheeler v. No. Colo. Irr. Co.	9 Colo. 248		203, 204, 205
In the m. of the Constitutionality of S. Rule No. —.	9 Colo. 641	Jan. 10, 1887	108
In the m. of the Constitutionality of SB. No. 76	9 Colo. 623	Jan. 17, 1887	97, 141, 156
In the m. of the Constitutionality of HB. No. 18	9 Colo. 623	Jan. 29, 1887	97, 111, 155, 159, 216
In the m. of the Constitutionality of s.9 of HB. No. 122	9 Colo. 639	Feb. 5, 1887	97, 118, 156, 157
In the m. of Sen. Resolutions, etc.	9 Colo. 626	Feb. 10, 1887	123, 211
In the m. of the Constitutionality of HB. No. 158	9 Colo. 625	Feb. 11, 1887	140, 155
In the m. of HB. No. 166	9 Colo. 628	Feb. 14, 1887	125, 128, 156
In the m. of "A Bill for an Act to provide for the amicable adjustment of grievances and disputes that may arise between employers and employees, and to authorize the creation of a Board of Arbitration."	9 Colo. 629	Feb. 15, 1887	124, 156
In the m. of House Resolution—(re)—Taxation of patented mining lands	9 Colo. 622	Feb. 23, 1887	114, 211
In the m. of HB. No. 231	9 Colo. 624	Feb. 24, 1887	97, 107, 118, 155
In the m. of Sen. Resolution on the Subject of Irrigation	9 Colo. 620	Mar. 7, 1887	53, 127, 174, 181, 185, 188, 206, 210, 212, 220
In the m. of HB. No. 38	9 Colo. 631	Mar. 7, 1887	98, 155
In the m. of the Constitutionality of HB. No. 270 & SBB. Nos. 69 & 106	9 Colo. 635	Mar. 11, 1887	97, 113, 156, 217
In re Sen. Resolution Relating to the Recall of Bills Transmitted to His Excellency the Governor for Approval	9 Colo. 630	Mar. 18, 1887	107, 108, 211, 212

<i>Colorado</i>			PAGE
In the m. of Sen. Resolution of Mar. 31, 1887, re Construction of Const. IV 11 in rel. to SB. No. 56	9 Colo. 632	Apr. 1, 1887	107, 155
In the m. of HB. No. 203	9 Colo. 631	Apr. 2, 1887	128, 144, 155
Veto Power—Special Session of Gen'l Ass'y	9 Colo. 642	(Apr. 4, 1887)	100, 103, 211, 213
In re Election of District Judges	11 Colo. 373	1888	140, 153, 199, 230
In the m. of HR. re Constitutionality of Legislature Redistricting State for Legislative Purposes	12 Colo. 186	Jan. 18, 1889	101, 155, 212
In re SR. rel. to Constitutionality of Proposed Reapportionment Bill	12 Colo. 187	Jan. 28, 1889	101, 155, 212
In re SB. Providing for a Board of Public Works in the City of Denver	12 Colo. 188	Jan. 29, 1889	118, 131, 151, 155, 216, 222
In re SR. Relating to Appropriation of Moneys Belonging to Internal Improvement Fund	12 Colo. 287	Feb. 18, 1889	98, 115
In re SR. Relating to Internal Improvement Fund Provided for by Act of Cong. of Sept. 4, 1841	12 Colo. 285	Feb. 20, 1889	115, 156, 175, 211
In re HR. Relating to HB. No. 116	12 Colo. 289	Mar. 2, 1889	98, 155
In re SR. Relating to SB. No. 1	12 Colo. 290	Mar. 2, 1889	98, 155
In re HB. No. 238	12 Colo. 337	Mar. 5, 1889	97, 155
In re SR. Relating to SB. No. 45, as passed and approved Feb. 20, 1889	12 Colo. 339	Mar. 5, 1889	107, 199
In re HR. Relating to HB. No. 218 Concerning Terms of District Court of El Paso Co.	12 Colo. 359	Mar. 12, 1889	98, 107, 141, 199
In re SR. Relating to SB. No. 31	12 Colo. 340	Mar. 16, 1889	98, 140, 155
In re HR. Relating to HB. No. 349	12 Colo. 395	Mar. 23, 1889	98, 118, 130, 156
In re Question Propounded by the Governor	12 Colo. 399	1889	132, 199

<i>Colorado</i>			PAGE
District Attorneys. In the m. of the Constitutionality of SB. No. 65	12 Colo. 466	1889	46, 49, 50, 51, 98, 107, 124, 148, 175, 176, 185, 188, 189, 194, 197, 199, 200, 203, 205, 206, 208, 211, 213, 217, 219, 221, 228
In re Appropriations by Gen'l Ass'y	13 Colo. 316	1889	115, 116, 117, 130, 148, 157, 175, 186, 194, 200, 206, 217
In re Funding of Co. Indebtedness	15 Colo. 421	1890	146, 148, 205
In re Speakership of the House of Representatives	15 Colo. 520	1891	106, 148, 175, 205
In re Constitutionality of a Court of Appeals	15 Colo. 578	1891	141, 155, 156
In re Constitutionality of SB. No. 69	15 Colo. 601	Mar. 5, 1891	155, 217
In re HR. No. 25	15 Colo. 602	Mar. 11, 1891	98, 107, 118, 131, 138, 175, 193, 199, 212
In re HB. No. 165	15 Colo. 593, 595	Mar. 12, 1891	98, 118, 156, 159, 192, 216
In re House Resolutions Concerning Street Improvements	15 Colo. 598	Mar. 13, 1891	113, 122, 156, 186, 188, 189, 192
In re HB. No. 10, Concerning the Weighing of Coal	15 Colo. 600	Mar. 30, 1891	121, 156, 192
People v. Richmond et al.	16 Colo. 274	1891	235
In re Gen'l Appropriation Bill	16 Colo. 539	1891	107, 130, 199
Henderson v. People ex rel. Wingate	17 Colo. 587	1892	235
In re Continuing Appropriations	18 Colo. 192	Feb. 6, 1893	117, 148, 181, 200
In re Loan of School Fund	18 Colo. 195	Feb. 10, 1893	118, 123, 148, 156, 216

<i>Colorado</i>			PAGE
In re Board of Capitol Commissioners	18 Colo. 220	1893	128, 200
In re Kindergarten Schools	18 Colo. 234	Feb. 17, 1893	123, 155, 217
In re Compensation of Co. Judges	18 Colo. 272	Feb. 21, 1893	141, 156
In re Bounties	18 Colo. 273	Feb. 25, 1893	98, 114, 155
In re Extension of Boundaries of the City of Denver	18 Colo. 288	Mar. 14, 1893	98, 126, 156
In re University Fund	18 Colo. 398	Mar. 16, 1893	119, 123, 175, 200, 216
In re Emergency Clause	18 Colo. 291	Mar. 18, 1893	107, 212
In re Internal Improvements	18 Colo. 317	Mar. 25, 1893	115, 155, 216
In re Leasing of State Lands	18 Colo. 359	1893	137, 148, 200
In re Certificates of Indebtedness	18 Colo. 566	1893	130, 200
In re Priority of Legislative Appropriations	19 Colo. 58	1893	52, 117, 119, 131, 148, 181, 186, 194, 222, 229
In re Canal Certificates	19 Colo. 63		118, 137, 148, 200, 217
Mayor, etc. v. Shattuck	19 Colo. 104		235
In re Governor's Proclamation	19 Colo. 333	Jan. 24, 1894	108, 148, 155
In re Amendments of Legislative Bills	19 Colo. 356	Feb. 27, 1894	98, 107, 148, 155
In re Penitentiary Commissioners	19 Colo. 409	1894	136, 148, 175, 186, 191, 194, 199
In re Fire and Excise Commissioners	19 Colo. 482	1894	52, 133, 148, 158, 187, 189, 217, 229
People v. Martin & People v. Orr	19 Colo. 565	1894	158, 187, 188, 192, 218, 229, 235
People v. State Board of Equalization	20 Colo. 220		235
People v. McClees	20 Colo. 403		230
City of Denver v. Coulehan	20 Colo. 471		235
In re Appointments by the Governor of Fire, Police and Excise Commissioners of the City of Denver	21 Colo. 14		129, 186, 188, 193, 200

<i>Colorado</i>			PAGE
In re HB. No. 203	21 Colo. 27	Mar. 1, 1895	98, 99, 124, 155, 156, 157, 217
In re HB. No. 107	21 Colo. 32	Mar. 1, 1895	98, 127, 216
In re Constitutionality of SB. No. 293	21 Colo. 38	Mar. 1, 1895	98, 126, 148, 156, 157, 218
In re a Bill Providing that Eight Hours Shall Con- stitute a Day's Labor	21 Colo. 29	Mar. 8, 1895	98, 124, 155, 156, 157, 159, 211, 216
In re Constitutionality of an Act, etc.	21 Colo. 46	Mar. 11, 1895	98, 108, 156, 200
In re Relief Bills	21 Colo. 62	1895	114, 219
In re Constitutionality of Substitute for SB. No. 83	21 Colo. 69	Mar. 28, 1895	118, 155
People ex rel. v. LeFevre	21 Colo. 218		229, 235
In re Contracting of State Debt by Loan	21 Colo. 399		130, 199
In re Casual Deficiency	21 Colo. 403		118, 199, 217, 219, 220
Parks v. Soldiers' and Sailors' Home	22 Colo. 86		116, 207, 230, 235, 256
People ex rel. v. District Attorney of Arapahoe Co.	23 Colo. 150		235
In re Constitutionality of SB. No. 196	23 Colo. 508	Mar. 11, 1897	115, 193, 200
In re Inheritance Tax, HB. No. 122	23 Colo. 492	Mar. 12, 1897	98, 110, 155
In re Bill—to Abolish the use of Scrip in Payment for Labor—HB. No. 147	23 Colo. 504	Mar. 27, 1897	124, 211, 212, 216, 220
In re Consolidation of School Districts—SB. No. 23	23 Colo. 499	Apr. 2, 1897	98, 156, 157, 212
In re Internal Improve- ment Fund	24 Colo. 247	1897	115
In re State Board of Equalization	24 Colo. 446	1897	130, 148, 186, 188
In re Assessment of Pro- perty by the State Board of Equalization	25 Colo. 296		113, 119, 131, 181, 186, 188, 189
In re Annexation and Consolidation of School Districts, SB. No. 9	26 Colo. 136	Feb. 20, 1899	97, 123, 156, 157, 191
In re HB. No. 99, to Se- cure to Laborers Pay- ment of Wages in Law- ful Money of the U. S.	26 Colo. 140	Feb. 20, 1899	98, 124, 186, 188, 191, 205, 220

276 DEPARTMENTAL COÖPERATION IN STATE GOVERNMENT

<i>Colorado</i>			PAGE
In re SB. No. 142, to Regulate Jury Trials in Civil Cases	26 Colo. 167	Mar. 7, 1899	98, 141, 186, 189
In re HB. No. 495, to Amend the Constitution of the State of Colorado	26 Colo. 182	1899	98, 127, 146, 211, 212
In re HB. No. 250, to Create a State Board of Assessors	26 Colo. 234	1899	107, 217
In re Application of Morgan for Writ of Habeas Corpus	26 Colo. 415		155, 157, 230, 235
C. F. & I. Co. v. State Board of Land Commissioners	14 Colo. App. 84	1899	236
In re Leasing of State Lands	27 Colo. 99	1899	138, 186, 188, 200
Stuart v. Nance	28 Colo. 194		235
In re SB. No. 27, to Regulate Payment of Wages	28 Colo. 359	1901	98, 124, 186, 191, 205
In re SR. No. 7, to Repeal Constitutional Amendments	29 Colo. 350	Feb. 4, 1902	127, 146, 211, 212, 216
People ex rel. v. Sours	31 Colo. 369		235
Denver v. Londoner	33 Colo. 104		235
In re SR. No. 10, Concerning Governorship Contest	33 Colo. 307	Mar. 13, 1905	106, 126, 129, 152, 189, 190, 191, 200, 205, 212
City of Denver v. Iliff	38 Colo. 357		235
In re SB. No. 416	45 Colo. 394	Apr. 2, 1909	107, 109, 207, 211, 212, 219, 220
In re HR. No. 10	50 Colo. 71	Mar. 6, 1911	98, 108, 145, 148, 156, 191, 222
Questions Propounded by Governor in re Proposed Amendments to the Constitution and Initiated and Referred Measures	50 Colo. 84	1911	191
In re Interrogatories of the Senate	54 Colo. 166	Jan. 24, 1913	106, 148, 151, 152, 160, 175, 186, 188, 189, 191, 205, 213, 222, 231

<i>Colorado</i>			PAGE
In re SR. No. 4	54 Colo. 262	Feb. 28, 1913	98, 108, 155, 188, 200, 211, 250
In re SR. No. 9	54 Colo. 429	Mar. 26, 1913	107, 140, 155
In re Questions of the Governor	55 Colo. 17		117, 130, 148, 199
In re Questions by the Governor	55 Colo. 105		138, 200
In re Interrogatories of the House	162 Pac. 1144	Jan. 24, 1917	117, 200, 211
<i>Connecticut</i>			
Opin. of the Judges of the Supreme Court	30 Conn. 591	1862	71, 143, 180, 201
Opin. of the Judges of the Supreme Court	32 Conn. 565	1865	71, 180
Reply of the Judges of the Supreme Court to the Gen'l Ass'y	33 Conn. 586	1867	72, 78, 111, 180, 187, 224, 250
<i>Florida</i>			
In the m. of the Executive Communication of the 14th Oct. 1868	12 Fla. 651	Oct. 19, 1868	47, 128, 148
In the m. of the Executive Communication of the 9th of Nov. 1868	12 Fla. 653	Nov. 24, 1868	47, 105, 128, 139, 150, 158, 174, 179, 192, 194
In the matter of the Executive Communication of the 28th Jan. 1869	12 Fla. 686	Jan. 29, 1869	47, 148, 174, 217, 224
In the m. of the Executive Communication of Jan. 29th, 1869	12 Fla. 689		130, 150, 152
In the m. of the Executive Communication of June 2nd, 1870	13 Fla. 687	June 6, 1870	146, 151
In the m. of the Executive Communication of Feb. 6th, 1871	13 Fla. 699	Feb. 11-25, 1871	114, 151
In the m. of the Executive Communication of Feb. 1st, 1872	14 Fla. 277	Feb. 5, 1872	128, 151
In the m. of the Executive Communication of Feb. 19th, 1872	14 Fla. 283	Feb. 19, 1872	108, 117, 148
In the m. of the Executive Communication of Feb. 29th, 1872	14 Fla. 285	Mar. 1, 1872	108, 148

278 DEPARTMENTAL COÖPERATION IN STATE GOVERNMENT

<i>Florida</i>			PAGE
In the m. of the Executive Communication of Apr. 17th, 1872	14 Fla. 289	Apr. 29, 1872	138, 150, 151, 174, 179, 224
In the m. of the Executive Communication of Sept. 23rd, 1872	14 Fla. 318	Sept. 27, 1872	148
In the m. of the Executive Communication of Jan. 16th, 1873	14 Fla. 320	Jan. 24, 1873	47, 125, 140, 148
In the m. of the Executive Communication of Oct. 5th, 1875	15 Fla. 735	Oct. 28, 1875	140, 149
In the m. of the Executive Communication of Nov. 8th, 1875	15 Fla. 739	Nov. 9-15, 1875	137, 151
Advisory Opinion. In the m. of the Tenure of Office of Judges of the Circuit Courts	16 Fla. 841	Jan. 19, 1877	140, 149
In re Executive Communication Concerning Powers of Legislature	23 Fla. 297	May 10, 1887	48, 54, 127, 149, 174, 179
Vacancies in Elective Co. Officers	25 Fla. 426	Jan. 16, 1889	132
In re Advisory Opin. to the Governor	31 Fla. 1	Jan. 20, 1893	137
In re Advisory Opin. to the Governor	34 Fla. 500	Jan. 5, 1895	145
In re Opin. of Supreme Court	39 Fla. 397	Feb. 12, 1897	136, 194, 197
In re Advisory Opin.	43 Fla. 305	Oct. 8, 1901	48, 108, 130
In re Advisory Opin. to the Governor	45 Fla. 154	May 5, 1903	132, 140
In re Members of Legislature	49 Fla. 269	July 28, 1905	132
Advisory Opin. to Governor	50 Fla. 169	July 29, 1905	117, 197
In re Opin. of Justices	54 Fla. 136	July 17, 1907	130, 148, 197
Advisory Opin. to the Governor	61 Fla. 1	May 20, 1911	138, 148
In re Advisory Opin. to Governor	62 Fla. 7	June 22, 1911	135, 150
In re Opin. of Judges	62 Fla. 4	July 17, 1911	131, 197
In re Opin. of Judges	62 Fla. 1	Jan. 8, 1912	132
In re Advisory Opin. to Governor	64 Fla. 1	Sept. 24, 1912	131, 145, 197
In re Advisory Opin. to the Governor	64 Fla. 16	Sept. 26, 1912	132
In re Advisory Opin. to the Governor	64 Fla. 21	Sept. 28, 1912	135

<i>Florida</i>			PAGE
In re Advisory Opin. to Governor	64 Fla. 168	Dec. 14, 1912	133
In re Advisory Opin. to the Governor	65 Fla. 434	May 14, 1913	131
In re Opin. of Justices	67 Fla. 423	Apr. 30, 1914	132, 140, 141
Opin. of the Justices	67 Fla. 489	May 20, 1914	133, 140
In re Opin. of the Justices	68 Fla. 560	Dec. 17, 1914	137, 140, 197
In re Opin.s of the Justices	69 Fla. 632	May 21, 1915	133, 141, 150, 197, 224
In re Opin. of the Justices. In re Circuit Judges	69 Fla. 653	June 2, 1915	133, 140, 141, 197
<i>Illinois</i>			
People ex rel. v. Bissell	19 Ill. 229	1857	70, 249
<i>Iowa</i>			
Morrison v. Springer	15 Ia. 304		72
<i>Kentucky</i>			
Opin. of the Judges of the Court of Appeals	79 Ky. 621	1881	73, 132, 180
In re Board of Sinking Fund Commissioners	32 S. W. 414	1895	73, 139, 177, 180, 191
<i>Maine</i>			
Opin. of the Justices	3 Me. 477	Mar. 6, 1821	41, 100
Opin. of the Justices	3 Me. 481	Feb. 15, 1822	41, 128
Opin. of the Justices	2 Me. 439	Sept. 18, 1822	41, 128, 219
Opin. of the Justices	3 Me. 484	Feb. 18, 1825	140, 150, 151
Opin. of the Justices	3 Me. 487	(Feb. 26, 1825)	152
Opin. of the Justices	6 Me. 486	(Jan. 11, 1826)	101, 143, 150, 151, 152, 159
Opin. of the Justices	6 Me. 506	Jan. 30-Feb. 4, 1830	129, 150, 151
Opin. of the Justices	6 Me. 514	Feb. 4-10, 1830	102, 104, 152
Opin. of the Justices	7 Me. 483	Feb. 15, 1830	102, 103, 104, 136
Opin. of the Justices	7 Me. 492	(Jan. 26, 1831)	142, 143
Opin. of the Justices	7 Me. 497	June, 1831	142, 143
Opin. of the Justices	7 Me. 502	Sept., 1831	130
Opin. of the Justices	16 Me. 479	(Feb. 11, 1840)	126, 154, 206, 219
Opin.s of the Justices of the S. J. Court	18 Me. 458	(Feb. 4, 1842)	100, 101, 102, 110, 150, 217

<i>Maine</i>			PAGE
Opin.s of the Justices of the S. J. Court	25 Me. 567	(Nov. 6, 1845)	133, 143
Opin. of the Justices	33 Me. 587	(May 31, 1851)	100, 102, 217
Const'l Law	35 Me. 563	Jan., 1854	102, 150
Statement of Facts, and Questions	38 Me. 597	(Feb. 15, 1855)	131, 133, 143
Opin.s of the Justices of the S. J. Court	44 Me. 505	(Mar. 26, 1857)	143, 150
Opin. of the Justices of the S. J. Court on the Constitutionality of the Personal Liberty Laws of the State of Maine	46 Me. 561	Feb. 1861	126, 137, 150
Opin. of the Justices	52 Me. 595	July 2, 1863	146
Opin. of the Justices of the S. J. Court	50 Me. 607	Dec. 23, 1863	
Opin. of the Justices	53 Me. 587	Feb. 18, 1867	118
Taxation of Nat'l Banks	53 Me. 594	Feb. 26—Mar. 28, 1867	113, 150
Opin. of the Justices	54 Me. 602	Dec. 10, 1867	133, 144, 150
State v. Cleveland	58 Me. 564	Dec. 1870	136, 150, 167, 181, 225
Opin. of the Justices	58 Me. 590	Feb. 10-13, 1871	118, 121, 150, 151, 194, 206, 225
Thompson v. Pittston	59 Me. 545	1871	235
Opin.s of the Justices of the S. J. Court	64 Me. 588	Nov. 28—Dec. 12, 1871	41, 133, 144, 150
Allen v. Jay	60 Me. 124	1872	235
Opin. of the Justices of the S. J. Court	61 Me. 601	Aug. 10, 1872	128
Opin.s of the Justices of the S. J. Court	62 Me. 596	July 16, 1874	125, 128, 150
Opin. of the Justices of the S. J. Court	64 Me. 596	Dec. 6, 1875	128, 133, 143
Opin.s of the Justices of the S. J. Court	68 Me. 582	Feb. 9, 1876	110
Opin.s of the Justices of the S. J. Court	68 Me. 587	Dec. 22, 1877	133, 143
Opin.s of the Justices of the S. J. Court	68 Me. 589	Feb. 19—Mar. 11, 1878	143, 213
Opin.s of the Justices of the S. J. Court	68 Me. 593	June 20, 1878	146, 152
Opin.s of the Justices of the S. J. Court	68 Me. 594	June 20, 1878	140, 141, 152
Opin.s of the Justices of the S. J. Court	69 Me. 585		126
Opin.s of the Justices of the S. J. Court	69 Me. 596	Mar. 10, 1879	146

<i>Maine</i>			PAGE
Questions Submitted, etc. with the Answers of the Justices of the S. J. Court	70 Me. 560	Jan. 3, 1880	102, 104, 133, 143, 159, 225
Statement and Questions Submitted—with the Answers of the Justices of the S. J. Court	70 Me. 570	Jan. 16, 1880	41, 102, 103 128, 133, 143, 152, 179, 210, 226
Statement and Questions Submitted with An- swers of the Justices of the S. J. Court	70 Me. 600	Jan. 17, 1880	102, 103, 133, 159, 179, 210. 225, 249
Question Submitted— with Answers of the Justices of the S. J. Court	72 Me. 542	Sept. 1, 1881	132, 150, 171, 194, 210, 227
In re State Bonds	81 Me. 602	Apr. 1, 1889	118
Donnell v. Joy	85 Me. 119		235
Bangor v. Frankfort	85 Me. 128		235
Question Submitted by the Governor with An- swers of the Justices of the S. J. Court	85 Me. 545	Sept. 7, 1891	133, 171
In re Pardoning Power of Governor and Council	85 Me. 547	1893	135
Opin.s of the Justices	95 Me. 564	Dec. 2, 1901	101, 103, 104, 151, 152, 171, 172, 194, 208, 213, 227
In re Opin. of Justices	97 Me. 590	July 1, 1903	121
In re State Taxation	97 Me. 595	July 1, 1903	111, 213
In re Opin. of the Justices	99 Me. 515	Feb. 27, 1905	118, 150
In re R. R. Taxation	102 Me. 527	Mar. 20, 1907	111
In re Opin. of the Justices	103 Me. 506	Mar. 10, 1908	104, 122, 151, 171, 172, 213, 214, 227
In re Opin. of the Justices	108 Me. 545	Oct. 30, 1911	
Sawyer v. Gilmore	109 Me. 169	1912	227, 235
Laughlin v. City of Port- land	111 Me. 486	Apr. 4, 1914	227, 235
In re Opin. of the Jus- tices. Initiative and Referendum	114 Me. 557	Aug. 12, 1915	134, 144

<i>Massachusetts</i>			PAGE
Opin. of the Justices	126 Mass. 547	Feb. 22, 1781	33, 34, 118, 147, 158, 220, 256
Opin. of the Justices	14 Mass. 470	Nov. 12, 1784	34, 35, 125
Opin. of the Justices	14 Mass. 472	Nov., 1787	34, 35, 125
Opin. of the Justices	3 Mass. 567	May 9, 1791	34, 107
Opin. of the Justices	3 Mass. 568	Jan. 3, 1807	34, 40, 143, 178
Commonwealth v. Smith	9 Mass. 530	1810	179, 181
Opin. of the Justices	7 Mass. 523	Feb. 15, 1811	100
Opin. of the Justices	8 Mass. 548	1812	35, 134
Opin. of the Justices	15 Mass. 536	1815	101, 143
Opin. of the Justices	7 Pick. 130n	May 30, 1825	35, 166, 183, 187, 191, 193, 223
Opin. of the Justices	3 Pick. 517	1826	101
Adams v. Bucklin	7 Pick. 125	Apr., 1829	187, 223, 235
Opin. of the Justices	11 Pick. 537	Feb. 14, 1832	142
Opin. of the Justices	6 Cush. 573	Jan. 24, 1833	35, 145
Opin. of the Justices	18 Pick. 575	Mar. 31, 1836	143
Opin. of the Justices	1 Allen 197n	Oct. 10, 1837	35, 134
Opin. of the Justices	22 Pick. 571	Oct. 18, 1838	125, 178
Opin. of the Justices	6 Cush. 575	Mar. 29, 1839	35, 100
Opin. of the Justices	23 Pick. 547	Feb. 17, 1840	101, 143
Opin. of the Justices	3 Cush. 584	Apr. 6, 1840	35, 139, 193
Opin. of the Justices	1 Metc. 572	Mar. 1, 1841	146, 193
Opin. of the Justices	1 Metc. 580	Mar. 10, 1841	110, 123, 142, 193
Opin. of the Justices	5 Metc. 587	Mar. 15, 1843	110, 142, 193
Opin. of the Justices	5 Metc. 591	Mar. 9, 1844	142, 193, 256
Opin. of the Justices	5 Metc. 596	Mar. 13, 1844	166, 183, 187, 193, 217, 224
Opin. of the Justices	3 Cush. 586	Mar. 14, 1849	134
Opin. of the Justices	6 Cush. 578	Mar. 28, 1851	125, 143
Opin. of the Justices	9 Cush. 604	Sept. 20, 1852	166, 193, 217, 218
Opin. of the Justices	11 Cush. 604	Nov. 17, 1853	135, 178
Opin. of the Justices	3 Gray 601	July 2, 1855	128, 129, 132, 139, 140
Opin. of the Justices	8 Gray 20	Mar. 26, 1857	193
Opin. of the Justices	10 Gray 613	Mar. 11, 1858	100
Opin. of the Justices	13 Gray 618	Aug. 20, 1859	135
Opin. of the Justices	14 Gray 614	Dec. 23, 1859	125, 136
Opin. of the Justices	9 Allen 585	Nov. 3, 1864	140, 181, 193
Green v. Commonwealth	12 Allen 155		140, 181, 193, 206, 224
Opin. of the Justices	13 Allen 593	Jan. 29, 1867	130, 178

<i>Massachusetts</i>			PAGE
Opin. of the Justices	99 Mass. 636	Feb. 25, 1868	107
Opin. of the Justices	107 Mass. 604	June 29, 1871	140
Opin. of the Justices	115 Mass. 602	Feb. 20, 1874	158
Opin. of the Justices	117 Mass. 599	Mar. 5, 1875	134
Opin. of the Justices	117 Mass. 603	Apr. 20, 1875	125
Opin. of the Justices	120 Mass. 600	May 23, 1876	135, 217
Opin. of the Justices	122 Mass. 594	Mar. 7, 1877	101
Opin. of the Justices	122 Mass. 600	May 14, 1877	38, 101, 103, 167, 168, 170, 171, 172, 173, 176, 193, 209, 210, 224
Opin. of the Justices	124 Mass. 596	Apr. 8, 1878	
Opin. of the Justices	126 Mass. 557	Dec. 31, 1878	18, 30, 118, 170, 179, 191, 206, 209, 216, 217, 221, 256
Opin. of the Justices	126 Mass. 603	Mar. 10, 1879	129
Opin. of the Justices	132 Mass. 600	Jan. 3, 1882	134, 193
Opin. of the Justices	135 Mass. 594	June 5, 1883	107
Opin. of the Justices	136 Mass. 578	Nov. 19, 1883	128, 132
Opin. of the Justices	136 Mass. 583	Nov. 27, 1883	134, 144
Opin. of the Justices	138 Mass. 601	Feb. 24, 1885	125, 193
Opin. of the Justices	142 Mass. 601	May 27, 1886	100
Opin. of the Justices to the Governor and Council	145 Mass. 587	Sept. 22, 1887	132, 193, 215
Functions of Judiciary	148 Mass. 623	May 4, 1889	159, 170, 184, 196, 208, 209, 224, 236
Opin. of the Justices	150 Mass. 586	Mar. 18, 1890	132
In re Public Lighting	150 Mass. 592	May 28, 1890	121, 193
In re Power of Legislature to Require Opinion	150 Mass. 598	June 4, 1890	171, 172, 196
Opin. of the Justices	154 Mass. 603	Dec. 31, 1891	128, 131, 193
Opin. of the Justices. In re HB. No. 519	155 Mass. 598	May 7, 1892	121, 193
Opin. of the Justices	157 Mass. 595	Apr. 28, 1893	100, 125
In re Municipal Suffrage to Women	160 Mass. 586	Feb. 28, 1894	144, 149, 150
Watson v. Needham	161 Mass. 404	1894	236
Citizens' Gas Light Co. v. Wakefield	161 Mass. 432	1894	236
In re HB. No. 1230	163 Mass. 589	May 6, 1895	123
In re Opin. of the Justices	165 Mass. 599	Apr. 25, 1896	125, 128

<i>Massachusetts</i>			PAGE
Opin. of the Justices	166 Mass. 589	Sept. 26, 1896	132, 150
In re Opin. of the Justices	167 Mass. 599	Feb. 25, 1897	137
In re Opin. of the Justices	175 Mass. 599	June 5, 1900	114
In re HB. No. 1291	178 Mass. 605	Apr. 25, 1901	143, 150
In re Municipal Fuel Plants	182 Mass. 605	Jan. 28, 1903	121, 150
In re Bounties to Veter- ans	186 Mass. 603	Sept. 21, 1904	107, 113, 114, 206
In re Opin. of the Justices	190 Mass. 605	Apr. 30, 1906	117
In re Opin. of the Justices	190 Mass. 611	Apr. 30, 1906	114, 171, 184, 189, 206, 207, 209, 210, 217, 218, 224, 236
In re Opin. of the Justices	190 Mass. 616	May 29, 1906	135
Farwell v. Boston	192 Mass. 15	1906	235
In re Opin. of the Justices	193 Mass. 605	Apr. 30, 1907	120, 152, 191
In re Opin. of the Justices	195 Mass. 607	Mar. 23, 1908	110
Nichols v. Election Com- missioners	196 Mass. 410	1907	235
Opin. of the Justices	196 Mass. 603	May 21, 1908	110, 113, 152
In re Opin. of the Justices to the Governor and Council	201 Mass. 609	May 18, 1909	135
In re Opin. of the Justices	204 Mass. 607	Mar. 4, 1910	122
In re Opin. of the Justices	204 Mass. 616	Mar. 31, 1910	122
In re Opin. of the Justices	207 Mass. 601	Mar. 10, 1911	120
In re Opin. of the Justices	207 Mass. 606	Apr. 4, 1911	141
In re Opin. of the Justices	208 Mass. 603	Apr. 17, 1911	122
In re Opin. of the Justices	208 Mass. 607	Apr. 17, 1911	120
In re Opin. of the Justices	208 Mass. 610	Apr. 17, 1911	116, 130
In re Opin. of the Justices to the House of Repre- sentatives	208 Mass. 614	Apr. 28, 1911	107, 109, 209
In re Opin. of Justices	208 Mass. 616	May 15, 1911	110
In re Opin. of Justices	208 Mass. 619	May 16, 1911	123
In re Opin. of Justices to Senate	208 Mass. 625	June 13, 1911	122
In re Opin. of Justices	209 Mass. 607	July 24, 1911	124, 158, 219
In re Opin. of the Justices	210 Mass. 609	Jan. 12, 1912	135, 178
In re Opin. of the Justices	211 Mass. 605	May 3, 1912	120
In re Opin. of the Justices	211 Mass. 608	May 6, 1912	114, 150, 209, 210
In re Opin. of the Justices	211 Mass. 624	May 6, 1912	114, 122
In re Opin. of the Justices	211 Mass. 618	May 8, 1912	124
In re Opin. of the Justices	211 Mass. 620	May 27, 1912	40, 120, 178
In re Opin. of the Justices	211 Mass. 630	May 31, 1912	40, 129, 159, 178, 209, 215

<i>Massachusetts</i>			PAGE
In re Opin. of the Justices	211 Mass. 632	June 21, 1912	129, 159
In re Opin. of the Justices	214 Mass. 599	June 2, 1913	114, 224
In re Opin. of the Justices	214 Mass. 602	June 10, 1913	41, 178, 224, 235, 256 235
Attorney-General v. Hav- erhill Gas Light Co.	215 Mass. 394	1913	235
McNichol's Case	215 Mass. 497		158
In re Opin. of the Justices	216 Mass. 605	Mar. 20, 1914	128, 209, 210
In re Opin. of the Justices	217 Mass. 607	May, 1914	111, 171, 212, 216
Young v. Duncan	218 Mass. 346	1914	224, 235
Woods v. Woburn	220 Mass. 416	1915	224, 235
In re Opin. of the Jus- tices. In re Census	220 Mass. 609	Apr., 1915	100, 126
In re Opin. of the Jus- tices. In re Taxation	220 Mass. 613	Apr. 12, 1915	110, 113
In re Opin. of the Justices	220 Mass. 627	May 3, 1915	124, 150
Dinan v. Swig	223 Mass. 516	1916	217, 235, 250
In re Opin. of the Justices	115 N. E. 921	Apr. 16, 1917	144, 196, 212
In re Opin. of the Justices	115 N. E. 978	Apr. 23, 1917	120, 188
<i>Minnesota</i>			
In the m. of the Applica- tion of the Senate	10 Minn. 78	1865	70, 71, 78, 180, 195, 250, 257
Rice v. Austin	19 Minn. 103		71, 138, 180
State v. Dike	20 Minn. 363		71, 138, 180
<i>Missouri</i>			
Advisory Constitutional Opinion of the Judges of the Supreme Court	37 Mo. 129	1865	44, 114
Advisory Constitutional Opinion of the Judges of the Supreme Court	37 Mo. 135	1865	44, 45, 121, 173, 176, 184, 193, 197, 203, 205, 208, 210, 216
Advisory Constitutional Opinion of the Judges of the Supreme Court	37 Mo. 139	1866	45, 118, 197
Opin. of Court in Re- sponse to Governor	43 Mo. 351	1869	45, 141
Opin. of the Court in Re- sponse to Governor	49 Mo. 216	Jan. 23, 1872	45, 130, 150, 175
In the m. of the No. Mo. R. R.	51 Mo. 586	1873	45, 119, 173, 184, 194, 231

286 DEPARTMENTAL COÖPERATION IN STATE GOVERNMENT

<i>Missouri</i>			PAGE
Opin. of Supreme Court Judges on Township Organization Law	55 Mo. 295	Feb. 3, 1873	45, 150, 197 221
Opin. of the Judges of the Supreme Court in Response to a Resolution of the Senate	55 Mo. 215	1874	45, 140, 148
Opin. of the Court in Response to the Resolution of the General Assembly	55 Mo. 497	Feb. 23, 1874	45, 119, 173, 184, 194, 208
In the m. of Inquiries Submitted by His Excellency Governor Silas Woodson	58 Mo. 369	1874	45, 138, 148, 184, 193, 197
<i>Nebraska</i>			
In re RR. Commissioners	15 Nebr. 679	1883	75, 138, 180, 206, 224, 256
In re School Fund	15 Nebr. 684	1883	75, 123, 130, 180
In re Board of Public Lands and Buildings	18 Nebr. 340	1885	75, 131, 180
In re Babcock	21 Nebr. 500	1887	75, 137, 180, 201
In re State Warrants	25 Nebr. 659	1889	75, 180
In re Appropriations for Deputies, etc.	25 Nebr. 662	1889	75, 115, 137, 180, 192, 201
In re Senate File 31	25 Nebr. 864	1889	75, 108, 145, 180, 207
In re Quære of the Procedure of the Two Houses	31 Nebr. 262	1891	75, 126, 129, 180, 191, 201, 220
In re House Roll 284	31 Nebr. 505	Mar. 10, 1891	75, 118, 180, 191, 207, 219 76
Miller v. Wheeler	33 Nebr. 765		
In re Board of Purchase and Supplies for State Institutions	37 Nebr. 425	1893	76, 78, 137, 177, 180, 186, 195, 201, 206
State v. Fleming	70 Nebr. 523	1903	76, 250
<i>New Hampshire</i>			
Merrill v. Sherburne	1 N. H. 199		169
Opin. of the Court	62 N. H. 704	Nov. 25, 1816	39, 121, 132, 183, 203
An Opin. Delivered by the Court in Pursuance	4 N. H. 565	(June 25, 1827)	110, 126

<i>New Hampshire</i>			PAGE
of a Resolve of the House of Representatives			
Opinion	8 N. H. 573	June, 1835	100
An Opin. of the Justices of the Superior Court of Judicature, etc.	7 N. H. 599	June, 1835	112, 126
Opin. of the Justices of the Superior Court of Judicature, etc.	25 N. H. 537	Nov. 1852	112, 121, 167, 206, 217, 220, 224
Judicial Opinion	35 N. H. 579	Feb. 5, 1858	107, 149
Opin. of the Justices of the Supreme Judicial Court	41 N. H. 550	June 15, 1860	141
Opin. of the Justices of the Supreme Judicial Court	41 N. H. 553	June, 1861	112, 150, 220
Opin. of Justices	44 N. H. 633	June 26, 1863	71, 112, 143
Opin. of the Justices of the Supreme Judicial Court, etc.	45 N. H. 590	July 22, 1864	132
Opin. of the Justices of the Supreme Judicial Court, etc.	45 N. H. 593	July 29, 1864	217, 219
Opin. of the Justices of the Supreme Judicial Court, etc.	45 N. H. 595	Aug., 1864	112, 143, 152, 220
Opinion	45 N. H. 607	Sept. 23, 1864	107, 112, 217
Opin. of the Justices	53 N. H. 634	Mar. 19, 1866	39, 110, 179, 216
Opin. of the Justices	53 N. H. 640	May 28, 1873	133, 179, 207
Opin. of the Justices	52 N. H. 622	Aug. 20, 1873	107, 149, 256
Opin. of the Justices	56 N. H. 570	June 8, 1875	101, 103, 134
Opin. of the Justices	56 N. H. 574	June 8, 1875	101, 103, 134, 218, 250
Opin. of the Court	58 N. H. 621	Apr. 23, 1877	134
Opin. of the Justices	62 N. H. 706	July 23, 1877	39, 133, 179
Opin. of the Court	58 N. H. 623	July 10, 1879	113, 172, 220
Opin. of the Court	60 N. H. 585	June 10, 1881	126, 150, 172, 206, 209, 221
Opin. of the Justices	62 N. H. 706	Aug. 20, 1883	128, 133
Opin. of the Court	63 N. H. 625	July 30, 1885	106
In re School Law Manual	63 N. H. 574	Mar. 12, 1886	179
Opin. of the Justices	76 N. H. 612	July 22, 1889	39, 145
Opin. of the Justices. In re Chap. 304, Laws 1887	65 N. H. 673	Dec., 1889	
Bingham v. Jewett	66 N. H. 382	Jan. 6, 1891	235

<i>New Hampshire</i>			PAGE
In re Opin. of the Justices	66 N. H. 629	Mar. 31, 1891	152, 191, 220
Dow v. R. R.	67 N. H. 1	1886	235
Opin. of the Justices	67 N. H. 601	Sept. 6, 1892	146, 172, 194, 209
Opin. of Justices	70 N. H. 638	Feb. 13, 1899	126, 137, 194, 217, 224
Amoskeag Mfg. Co. v. Manchester	70 N. H. 336	1900	235
Opin. of the Justices	70 N. H. 640	(Jan. 3, 1901)	138, 147, 213
Opin. of the Justices	70 N. H. 642	Mar. 6, 1901	118
In re Probate Blanks	71 N. H. 621	Mar. 8, 1902	147, 179
Opin. of the Justices	72 N. H. 601	Feb. 25, 1903	137, 191, 210
Opin. of the Justices	72 N. H. 605	July 25, 1903	137, 210
In re Opin. of the Justices	73 N. H. 618	Feb. 20, 1905	144, 216, 219
In re Opin. of the Justices	73 N. H. 621	Jan. 2, 1906	132, 172, 192, 210
In re Opin. of the Justices	73 N. H. 625	Mar. 13, 1906	137, 209, 254
In re Opin. of Justices	74 N. H. 606	July 19, 1907	112, 137, 150, 151, 209
Wyatt v. State Board of Equalization	74 N. H. 552	June 2, 1908	235, 249
In re Opin. of the Justices	75 N. H. 613	Apr. 6, 1909	128, 172, 191, 194, 210
In re Opin. of the Justices	75 N. H. 622	Feb. 1, 1910	123, 130
In re Opin. of Justices	75 N. H. 624	Feb. 1, 1910	137
Murchie v. Clifford	76 N. H. 99	1911	235
In re Opin. of the Justices	76 N. H. 586	Feb. 28, 1911	144
In re Opin. of the Justices	76 N. H. 588	Mar. 6, 1911	110, 112, 113, 192
In re Opin. of the Justices	76 N. H. 597	Mar. 20, 1911	111, 172, 194, 206, 209, 219, 220, 224
In re Opin. of the Justices	76 N. H. 601	Oct. 4, 1911	107, 130, 194, 217
In re Opin. of the Justices	76 N. H. 609	Jan. 24, 1913	112, 113
French v. Lyme	77 N. H. 63		235
In re Opin. of the Justices	77 N. H. 606	Nov. 4, 1914	137, 191
In re Opin. of the Justices	77 N. H. 611	Mar. 1, 1915	110, 112, 113, 150, 216
In re Opin. of the Justices	100 Atl. 49	Feb. 15, 1917	114
In re Opin. of the Justices	99 Atl. 999	Feb. 27, 1917	125
<i>New Jersey</i>			
In re "An Act to Amend an Act Entitled 'An Act Concerning Public Utilities' "	83 N. J. L. 303	Sept. 27, 1912	93, 109, 180, 191, 225

<i>New York</i>			PAGE
Livingston v. VanIngen	9 Johns. 507	1812	240
Gibbons v. Ogden	17 Johns. 488	1820	240
People v. Green	1 Denio. 614	1845	66, 136, 180, 191
Opin. of the Justices	Deb. Mass. Conv. 1853, I, p. 138	1846	66, 126, 145, 180, 219, 220
Matter of Madden	148 N. Y. 136	1895	213, 249
Matter of Emmett	150 N. Y. 538	1896	249
Matter of Fairchild	151 N. Y. 359	1897	213, 249
Matter of Norton	158 N. Y. 130	1899	213, 249
Cataract Power Co. v. Buffalo	115 N. Y. Supp. 1045	1909	67, 177
<i>North Carolina</i>			
Opin. of the Justices	31 N. C. App.	1849	68, 142, 180, 191, 256
In the m. of Hughes	61 N. C. 57	1866	69, 135, 180, 249
Opins. of the Justices of the Supreme Court, etc.	64 N. C. 785	1870	68, 78, 100, 180, 250, 254
<i>Ohio</i>			
State v. Baughman	38 Ohio St. 455	1882	74, 78, 127, 177, 180, 249
<i>Oklahoma</i>			
State v. Johnson	21 Okla. 40	May 6, 1908	77, 136, 224
In re Opin. of the Judges	25 Okla. 76	Nov. 9, 1909	77, 136, 250
Opin. of the Judges	3 Okla. Cr. 315	Dec. 13, 1909	77, 136, 224
In re Opin. of the Judges	4 Okla. Cr. 594	Jan. 5, 1911	77, 136
In re Opin. of the Judges	6 Okla. Cr. 18	May 29, 1911	77, 136, 224
In re Opin. of Judges	6 Okla. Cr. 210	Oct. 10, 1911	77, 136, 224
In re Opin. of the Judges	8 Okla. Cr. 467	Dec. 31, 1912	78, 136, 181, 187
<i>Pennsylvania</i>			
Respublica v. DeLong- champs	1 Dall. 111	1784	64, 135, 180, 191
Report of the Judges of the Supreme Court, etc.	3 Binney 595	1808	65, 146, 147 180, 224
Chase v. Miller	Am. L. Reg. 2 (N. S.) 146		72

<i>Rhode Island</i>			PAGE
Trevett v. Weeden	Thayer, Cases I, p. 73		42, 147
Opin. of the Supreme Court	3 R. I. 299	June 14, 1854	42, 126, 141, 172
Taylor v. P lace	4 R. I. 324		169, 206, 224, 249, 250
Opin. of the Judges of the Supreme Court, etc.	4 R. I. 585	Oct. 24, 1857	128
Opin.s of the Judges of the Supreme Court, etc.	4 R. I. 587	Nov. 23, 1857	130
Opin.s of the Judges of the Supreme Court, etc.	4 R. I. 588	Jan. 7, 1858	130
Opin.s of the Judges of the Supreme Court, etc.	4 R. I. 583	Feb. 3, 1858	135
Opin. of the Judges of the Supreme Court, etc.	5 R. I. 598	Oct. 7, 1858	134
In re the Registry Laws	12 R. I. 580	Nov. 12, 1877	142
In re the Voting Laws	12 R. I. 586	Mar. 30, 1878	142
In re the Polling Lists	13 R. I. 729	Apr. 13, 1881	142
In re the Liquor Loca- tions	13 R. I. 733	July 28, 1881	
In re the Providence Vo- ters	13 R. I. 737	Apr. 11, 1882	142
In re the Realty Voters	14 R. I. 645	Nov. 16, 1882	142
In re the Constitutional Convention	14 R. I. 649	Mar. 30, 1883	126, 145, 219, 220
In re the Newport Char- ter	14 R. I. 655	Apr. 12, 1883	142
In re the Census Superin- tendent	15 R. I. 614	Apr. 24, 1885	131
In re the Plurality Elec- tions	15 R. I. 617	Feb. 9, 1887	144
In re the Representation Vacancy	15 R. I. 621	Feb. 9, 1887	131
In re the Congressional Election	15 R. I. 624	Apr. 7, 1887	126, 134
In re the Investigating Commission	16 R. I. 751	Oct. 5, 1887	131
In re the Constitutional Amendment	16 R. I. 754	Nov. 24, 1888	142
In re the Narragansett Election	16 R. I. 761	Jan. 16, 1889	144
In re the Ballot Act	16 R. I. 766	Jan. 22, 1890	143
In re Canvassers' Powers	17 R. I. 809	Oct. 4, 1890	142
In re the Vote Marks	17 R. I. 812	Oct. 28, 1890	144
In re the Agricultural Funds	17 R. I. 815	Dec. 2, 1890	
In re Building Inspectors	17 R. I. 819	Jan. 17, 1891	
In re the Representative Election	17 R. I. 820	Feb. 6, 1891	144

<i>Rhode Island</i>			PAGE
In re the Ballot Provision	17 R. I. 825	Mar. 3, 1891	143
Opin. of the Justices	18 R. I. 824	1893	106, 137, 144
In re Qualification of Voters	19 R. I. 614	July 23, 1896	142
Opin. of the Justices. In re Voting Machine	19 R. I. 729		143, 150
Opin. of the Justices	22 R. I. 651	Nov. 21, 1900	142
In re Police Commissioners	22 R. I. 654	Apr. 30, 1901	137
In re Voting Machines	23 R. I. 630	Oct. 23, 1901	143
In re Opin. of Judges	23 R. I. 635	Feb. 6, 1902	140
In re Opin. of the Justices	24 R. I. 625	Mar. 20, 1902	140
Opin. to the Governor	24 R. I. 630	June 14, 1902	142
In re Ten Hour Law for Street Ry. Corporations	24 R. I. 603	June 27, 1902	150
In re Election of School Committee of City of Woonsocket	28 R. I. 629	Mar. 2, 1903	42, 144
In re Abolishing School Districts	27 R. I. 598	Apr. 10, 1905	114, 123, 153
In re R. R. Commissioner	28 R. I. 602	Apr. 1, 1907	131
In re Decision of Justices (Elections by Senate)	28 R. I. 607	Apr. 21, 1908	132, 150
In re Opin. of Supreme Court	29 R. I. 611	Feb. 4, 1909	108, 145
In re Pothier, Governor	31 R. I. 565	Dec. 23, 1910	
In re Opin. of the Justices	34 R. I. 191	Apr. 17, 1912	118, 122
In re Opin. to Governor	35 R. I. 166	Feb. 24, 1913	130
<i>South Dakota</i>			
In re Construction of Revenue Law	2 S. D. 58	May 12, 1891	113, 147
In re Construction of School Law, Chap. 9, Sec. 7	2 S. D. 71	May 20, 1891	123, 147
In re Limitation of Taxation	3 S. D. 456	Jan. 14, 1893	54, 111
In re Construction of Constitution	3 S. D. 548	Feb. 23, 1893	46, 107, 186, 194, 195, 206
In re Supreme Court Vacancy	4 S. D. 532	Jan. 12, 1894	131, 140
In re State Warrants	6 S. D. 518	Feb. 8, 1895	54, 117, 130, 219, 220
In re State Census	6 S. D. 540	Feb. 18, 1895	54, 55, 126
In re State Bonds	7 S. D. 42	May 2, 1895	118, 130

<i>South Dakota</i>			PAGE
In re Chap. 6, Sess. L. 1890	8 S. D. 274	Feb. 25, 1896	54, 129, 176, 186, 208
In re House Resolution No. 30	10 S. D. 249	Oct. 19, 1897	54, 108, 176, 186, 210, 232
In re Opin. of Judges	13 S. D. 191	Apr. 14, 1900	138
In re Opin. of the Judges	34 S. D. 650	May 22, 1914	54, 111, 176, 192, 232
<i>Vermont</i>			
Opin. of the Judges of the Supreme Court, etc.	37 Vt. 665	Apr. 1, 1864	73, 143, 180, 201, 219
<i>Wisconsin</i>			
State ex rel. Chandler v. Main	15 Ia. 340		72
<i>Dominion of Canada</i>			
The Bill to Incorporate the Christian Brothers	Cass. Prac. 59	1876	90
Queen v. Robertson	6 Can. S. C. R. 127	1879	79, 249
In re New Brunswick Penitentiary	Cameron, p. 267	1880	80
In re Canada Temperance Act of 1878 and County of Perth	Cass. Dig. 105		80
In re Canada Temperance Act of 1878 and County of Kent	Cass. Dig. 106		80
The Thrasher Case	Cass. Dig. 480		80
The Manitoba Ry. Cross- ings Case	Cameron, p. 267		80
In re County Courts of British Columbia	21 Can. S. C. R. 446	1892	81, 142
In re Certain Statutes of —Manitoba Relating to Education	22 Can. S. C. R. 577	Feb. 20, 1894	82, 139, 177, 224
Brophy et al. v. Attorney- General of Manitoba	(1895) A. C. 202	1895	82
The Privy Council appeals from Canadian Advisory Opinions are listed under Canada rather than under England.			
In re Provincial Jurisdic- tion to Pass Prohibi- tory Liquor Laws	24 Can. S. C. R. 170	Jan. 15, 1895	82, 122, 190
Attorney-General for On- tario v. Attorney-Gen- eral for Dominion et al.	(1896) A. C. 348	1896	82, 195, 224

<i>Dominion of Canada</i>			PAGE
In the matter of Jurisdiction over Provincial Fisheries	26 Can. S. C. R. 444	Oct. 13, 1896	83, 122, 224
Attorney-General of Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia	(1898) A. C. 700	May 26, 1898	84, 184
In the m. of the Criminal Code—Relating to Bigamy	27 Can. S. C. R. 461	May 1, 1897	128
Union Colliery Co. of British Columbia v. Attorney-General of British Columbia et al.	27 Can. S. C. R. 637	Oct. 22, 1897	91, 92, 93, 125, 225
Attorney-General of Canada v. Attorney-General of Ontario	33 Can. S. C. R. 458	1903	93
In the m. of the Representation in the House of Commons, etc.	33 Can. S. C. R. 475	Apr. 29, 1903	104
In the m. of the Representation of Prince Edw. Island, etc.	33 Can. S. C. R. 594	June 8, 1903	84, 105, 190, 224
Attorney-General for P. E. I. v. Attorney-General for Dominion. Attorney-General for New Brunswick v. Attorney-General for Dominion	(1905) A. C. 37	1905	
In the m. of the Jurisdiction of a Province to Legislate Respecting Abstention from Labor on Sunday	35 Can. S. C. R. 581	Feb. 27, 1905	80, 84, 122, 125, 177
In re Ry. Act Amendment, 1904	36 Can. S. C. R. 136	May 15, 1905	125
Grand Trunk Ry. Co. v. Attorney-General of Canada	(1907) A. C. 65	1907	
In re International and Interprovincial Ferries	36 Can. S. C. R. 206	May 15, 1905	122, 139
In re Guarantee of Bonds of Grand Trunk Pacific Ry. Co.	42 Can. S. C. R. 505	Dec. 24, 1909	
Grand Trunk Pac. Ry. v. Rex	(1912) A. C. 204	1912	
In re Criminal Code	43 Can. S. C. R. 434	June 15, 1910	86, 142, 177, 187, 225

<i>Dominion of Canada</i>			PAGE
In re References by the Governor-General in Council	43 Can. S. C. R. 536	Oct. 11, 1910	17, 86, 122, 177, 225
Attorney-General for Ontario v. Attorney-General for Canada	(1912) A. C. 571	1912	5, 6, 17, 18, 25, 30, 87, 165, 177, 190, 195, 225
<i>Ontario</i>			
Attorney-General of Ontario v. Attorney-General for Dominion of Canada	(1894) A. C. 189	1894	92
Attorney-General for Dominion v. Attorney-General for Ontario	(1898) A. C. 247	1898	92, 133
Attorney-General for Ontario v. Hamilton St. Ry. Co. et al.	(1903) A. C. 524	1903	83, 92, 215
In re Ontario Medical Act	13 Ont. L. R. 501	1906	92, 216, 225

APPENDIX V

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The cases listed in Appendix IV are, of course, the basis for the foregoing study. These, together with the legislative records of a few States, make up practically all the source material consulted. There is very little secondary material on the advisory opinion—an essay by J. B. Thayer, and a few articles and notes in sundry law magazines. Included with these in the list below are several works of a general nature to which reference has been made in the text.

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INDEX

- Adams, John, responsible for introduction of advisory opinion in Massachusetts, 32-33.
- Adjournment of legislature, no opinion after, 213.
- Advisory opinion, history, 1-95; practice, 96-160; interpretation, 161-237; place in modern state, 248-257.
- Advisory opinion in England model for advisory opinion in United States, 18, 31-32.
- Amici curiae*, 190, 192, 207.
- Appointment and removal of executive officers, questions relating to, 131-133.
- Appropriations, questions relating to, 114-117.
- Attempts to repeal advisory opinion in Massachusetts, 35-38.
- Canada, history of advisory opinion in, 79-90; interpretation, 177, 195, 201, 224-225; text of advisory opinion in, 260-261.
- Canadian Provinces, history of advisory opinion in, 90-93; text of advisory opinion in, 261-266.
- Careless reporting of advisory opinions, 34-35, 39, 41, 52.
- Case, meaning of, in United States courts, 61-62.
- Colombia, history of advisory opinion in, 94, 245; judicial participation in legislation in, 94, 243-244; text of advisory opinion in, 267.
- Colorado, history of advisory opinion in, 48-53; source of interrogations in 97-99; interpretation, 174-175, 184-186, 187-189, 197-201, 202-205, 210-213, 216, 217-218, 221-222, 228-231; judicial recommendations to legislature, 242; text of advisory opinion in, 259.
- Composition and organization of executive department, questions relating to, 128-129.
- Composition of legislature, questions relating to, 100-104.
- Connecticut, history of advisory opinion in, 71-72.
- Constitutional questions, limitation of advisory opinion to, in Missouri, 43, 196-197; in Florida, 47, 196-197.
- Council of revision, 238-240.
- Counsel, lack of assistance of, 29, 76, 81, 190-192, 206-207.
- Court, not justices, to give advisory opinions in Colorado, 51-52, 148, 221-222.
- Court of claims, 62-64.
- Criminal cases, judicial advice in, in New York, 65-66; in Oklahoma, 76-78.
- Criminal law, questions relating to execution of, 135-136.
- Delaware, history of advisory opinion in, 69.
- Desirability of advisory opinion, 248-257.
- Ecuador, judicial initiation of legislation in, 243.
- Education, questions relating to, 122-123.
- Effect of advisory opinions, in Massachusetts, 38-39, 158-159; in Colorado, 115-116, 154-158; upon interrogators generally, 153-160, 234-235.
- Electoral duties of executive, questions relating to, 133-134.
- Eminent domain, questions relating to, 122.
- England, history of advisory opinion in, 1-30.
- Executive questions referred, 128-139.

- Existing statutes, construction of, in advisory opinions, 45, 76, 109, 193-202.
- Ex parte objection, 106, 182-192.
- Extra-judicial consultation in the United States, under a constitutional clause, 30-55, 178-179; when not authorized by the constitution 55-78, 176-177, 179-180.
- Fact, questions of, no advisory opinion on, 217-218.
- Financial administration, questions relating to, 129-131.
- Financial powers and duties of legislature, questions relating to, 110-120.
- Florida, history of advisory opinion in, 46-48; interpretation, 173-174; 224; text of advisory opinion in, 259.
- Form of advisory opinions, per curiam in Colorado, 52, 147-148, 222; generally, 146-153.
- Future action, no opinion unless possibility of, 103-104, 208-214.
- Governor alone can consult judges, in Florida, 46, 174; in South Dakota, 54.
- Guatemala, judicial initiation of legislation in, 243.
- Hawaii, history of advisory opinion in, 93-94.
- History of advisory opinion, in England, 1-30; in the United States, 30-78; in Canada, 79-93; in Hawaii, 94; in Colombia, 95; in Panama, 95. For different States of United States, see under name of each State.
- Honduras, judicial participation in legislation in, 94-95, 243-244; text, 267.
- House of Lords in England, right to consult judges in its judicial capacity, 18-25, 246; in its legislative capacity, 25-30.
- Illinois, attitude toward advisory opinion in, 69-70; revisory council in, 240.
- Impeachments, assistance of judges in, 246-247.
- Important question and solemn occasion clause, basis in English practice, 16, 32; not in Rhode Island, 42; narrow form in Missouri, 43-45; in Colorado, 52; in South Dakota, 54; in Canada, 81; interpretation of, 111, 167-168, 207-208.
- Individual opinions of justices should be given in general, 149-151, 221-222.
- Interpretation of advisory opinion clause, in Missouri, 44-45; generally, 161-237.
- Judges in England, duty to advise king in his judicial capacity, 2-6; duty to advise king in his executive capacity, 6-18; duty to advise House of Lords in its judicial capacity, 18-25; duty to advise House of Lords in its legislative capacity, 25-30.
- Judicial Committee of Privy Council, advisory nature of, 5-6, 17.
- Judicial discretion to refuse opinions, 161-177.
- Judicial nature of questions referred, 205-206.
- Judicial notice of facts not stated in reference, 218-219.
- Judicial participation in legislation, in Colombia, 94; in Salvador, 94-95; in Honduras, 94-95; in Nicaragua, 94-95.
- Judicial recommendations to legislatures, in United States, 241-242; in Venezuela, 242; in Panama, 242.
- Judiciary, questions relating to, referred for advisory opinions, 139-142.
- Kentucky, history of advisory opinion in, 73-74.
- King of England, right to consult judges in his judicial capacity, 2-6; in his executive capacity, 6-18.
- Labor, questions relating to, 123-125.
- Legal force of advisory opinions, in early English practice, 14-16, 223; to House of Lords, 23-24, 223; in Oklahoma, 77, 224; in Canada, 81, 83, 91, 224-225; in Maine, 225-227; in Colorado, 228-231; generally, 223-227.

- Legislative questions referred, 100-128.
- Maine, history of advisory opinion in, 40-41; interpretation, 171-172, 194, 201, 213, 225-227; text of advisory opinion in, 258.
- Majority opinions, 150-152.
- Massachusetts, history of advisory opinion in, 30-39; interpretation, 166, 167-171, 178-179, 183-184, 193, 201, 205-206, 209, 215-216, 218, 221, 223-224; text of advisory opinion in, 258.
- Military questions referred, 134.
- Minnesota, history of advisory opinion in, 70-71.
- Miscellaneous questions referred for advisory opinions, 145-146.
- Missouri, history of advisory opinion in, 43-46; interpretation, 44-45, 173, 184, 203, 205, 216, 221, 231-232; text of advisory opinion in, 258.
- Nature of questions, 99-146.
- Nebraska, history of advisory opinion in, 74-76.
- Nicaragua, judicial participation in legislation in, 94-95, 243-244; text, 267.
- North Carolina, history of advisory opinion in, 68-69; practice, 191.
- New Hampshire, history of advisory opinion in, 39-40; interpretation, 172, 179, 183, 191, 194, 201, 203, 206, 209-210, 213, 218, 221, 224; assistance of judges in impeachments, 246; text of advisory opinion in, 258.
- New Jersey, extra-constitutional consultation of judges in, 109, 191.
- New York, history of advisory opinion in, 65-68; council of revision in, 238-240; assistance of judges in impeachments, 247.
- Obligation of judges to give advisory opinions, 161-177.
- Ohio, history of advisory opinion in, 74.
- Oklahoma, history of advisory opinion in, 76-78; practice, 224.
- Organization and procedure of legislature, questions relating to, 105-109.
- Panama, history of advisory opinion in, 95, 245; judicial recommendations to legislature in, 242; text of advisory opinion in, 267.
- Pending cases, opinions relating to, in early English practice, 9-14; in the United States, 180-181.
- Pending legislation, advisory opinions relating to, in Colorado, 49-50, 210-212; in Canada, 84-85; in New Hampshire, 112.
- Pennsylvania, history of advisory opinion in, 64-65; assistance of judges in impeachments in, 247.
- Per curiam replies, in Colorado, 52, 147-148, 222; generally, 148-149.
- Peru, judicial initiation of legislation in, 243.
- Police power of legislature, questions relating to, 120-122.
- Possibility of future cases no reason for refusing opinions, 181-205.
- Precedents, force of advisory opinions as judicial, in Colorado, 51-52, 228-231; in Canada, 83, 224-225; in Maine, 225-227; generally, 223-227.
- Private rights, advisory opinions should not affect, 106, 180-181, 182-202.
- Publication of advisory opinions required, in Missouri, 43-44, 146; in Colorado, 52, 146.
- Publici juris questions, 202-205.
- Quality of advisory opinions, 153-154, 234, 255-256.
- Questions of too general nature, no obligation to answer, 29, 215-217.
- Revisory council, in federal convention of 1787, 55-57, 240; in New York, 238-240; in Illinois, 240.
- Rhode Island, history of advisory opinion in, 41-43; interpretation, 172-173, 201, 224; text of advisory opinion in, 258.
- Right of judges to refuse opinions, 161-177.
- Salvador, judicial participation in legislation in, 94-95, 243-244; text, 267.
- San Domingo, judicial initiation of legislation in, 243.

- Separation of powers theory in relation to advisory opinion, 33, 37, 162, 168-169, 248, 251.
- Source of interrogations, 96-99.
- South Dakota, history of advisory opinion in, 54-55; interpretation, 175-176, 201, 232; text of advisory opinion in, 259.
- Success of advisory opinion, in Massachusetts, 38-39; in New Hampshire, 40; in Rhode Island, 43; in Colorado, 52-53; in South Dakota, 54-55.
- Suffrage and elections, questions relating to, 142-145.
- Taxation, questions relating to, 110-114.
- Time, lack of, as excuse for no opinion, 112-113, 219-221.
- United States, history of advisory opinion in, 30-78; extra-judicial consultation of judges in the federal government, 55-64.
- Venezuela, judicial recommendations to legislature in, 242.
- Vermont, history of advisory opinion in, 72-73; assistance of judges in impeachments in, 247.
- Writing, requirement that advisory opinions be in, 42, 146.